# Petition

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# IN THE
# SUPREME COURT OF THE UNITED STATES
# JANUARY TERM, 1982

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NO. ____________

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JOHONNAS JUSTUS EICKE, Petitioner,

v.

ELIZABETH LARUE EICKE, Respondent.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA

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January 4, 1982

## QUESTION PRESENTED

Whether Louisiana may refuse to give full faith and credit under the provisions of Article IV, Section 1 of the United States Constitution to a final judgment of divorce and custody rendered in Texas where Texas had jurisdiction over the parties and jurisdiction over the subject matter.

# INDEX

Opinion below . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 7

Jurisdiction. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

Question presented . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

Statutory provisions involved . . . . . . . . . . . . . . . . . . . . . . 8

Statement of the case . . . . . . . . . . . . . . . . . . . . . . . . . . 9

Reasons for granting the writ . . . . . . . . . . . . . . . . . . . . . . 11

The decision below is in conflict with the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution and has resulted in two conflicting final judgments in different states regarding which parent has custody of the two minor children . . . . . 11

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 22

Appendix

Petition to have foreign judgment made executory . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 27

Judgment in the 237th District Court of Lubbock County, Texas . . . . . . . . . . . . . . . . . . . . 29

Judgment of Twenty-eighth Judicial District Court, La Salle Parish, Louisiana . . . . . . . . . . . . 33

Opinion of the Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana. . . . . . 35

Majority Opinion of Court of Appeal, Third Circuit, State of Louisiana . . . . . . . . . . . . . . . . . . 39

Dissenting Opinion of Court of Appeal, Third Circuit, State of Louisiana . . . . . . . . . . . . . . . . . 49

Denial of rehearing. . . . . . . . . . . . . . . . . . . . . . . . . . 54

Denial of application for writ of review by Louisiana Supreme Court . . . . . . . . . . . . . . . . . . 55

# CITATIONS

## CASES:.

Webb v. Webb, 101 S. Ct. 1899 (1981) ...... 15

Williams v. State of North Carolina,
317 U.S. 287, 63 S. Ct. 207 (1942)...... 19

Williams v. State of North Carolina,
325 U.S. 226, 65 S. Ct. 1092 (1945) .... 21

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NO. __________

JOHONNAS JUSTUS EICKE, Petitioner,
v.
ELIZABETH LARUE EICKE, Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA

The petitioner Johonnas Justus Eicke respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Third Circuit, State of Louisiana entered in this proceeding on May 27, 1981, writs of certiorari being denied by the Louisiana Supreme Court on October 9, 1981.

## OPINION BELOW

The denial by the Supreme Court of the State of Louisiana of petitioner's application for a writ of review is attached hereto as well as a copy of the opinion of the Court of Appeal, Third Circuit, State of Louisiana, rendered by split decision on May 27, 1981. A copy of the opinion of the Twenty-eighth Judicial District Court, Parish of LaSalle, State of Louisiana, rendered on September 2, 1980, is also attached hereto.

## JURISDICTION

The judgment of the Supreme Court of the State of Louisiana denying petitioner's application for writ of review to the Court of Appeal, Third Circuit, State of Louisiana, was rendered on October 9, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

## QUESTION PRESENTED

Whether Louisiana may refuse to give full faith and credit under the provisions of Article IV, Section 1 of the United States Constitution to a final judgment of divorce and custody rendered in Texas where Texas had jurisdiction over the parties and jurisdiction over the subject matter.

## STATUTORY PROVISIONS INVOLVED

### United States Constitution, Article IV, Section 1

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

### United States Code, Title 28, Section 1738

Such acts, records and judicial proceedings and copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken.

### Louisiana Code of Civil Procedure, Article 2541

A party seeking recognition or execution by a Louisiana Court of a judgment or a decree of a Court of the United States or Territory thereof, or of any other State, or of any foreign country, must bring an ordinary proceeding against the judgment debtor in the proper Louisiana Court, to have the judgment or decree recognized and made the judgment of the Louisiana Court.

## STATEMENT OF THE CASE

Petitioner and respondent were married on January 3, 1974, in Ketchikan, Alaska, and later moved to Texas where two children were conceived and born, namely, Sunnydale J. Eicke, born March 23, 1976, and Christopher Allan Eicke, born July 22, 1978. In late 1978, petitioner, respondent and their two children moved to Louisiana for a short time but returned to Texas in April, 1979, where they resided until August 9, 1979, at which time respondent abandoned petitioner in Texas and established a separate domicile in LaSalle Parish, Louisiana, with the two children.

On October 26, 1979, respondent filed suit in the Twenty-eighth Judicial District Court in and for LaSalle Parish, Louisiana, against petitioner seeking a judgment of separation from bed and board from petitioner and further seeking legal custody of the minor children. An attorney was appointed, subject to the provisions of Article 5091 of the Louisiana Code of Civil Procedure, to represent the non-resident defendant, petitioner herein, who had remained at the former matrimonial domicile in Texas. On December 14, 1979, judgment was rendered in the Twenty-eighth Judicial District Court granting unto respondent a judgment of separation from bed and board from petitioner herein and further awarding to her the legal care, custody and control of the minor children born of the marriage. Petitioner did not personally appear in these proceedings.

On April 16, 1980, petitioner filed a suit in the 237th

District Court in and for Lubbock County, Texas, seeking a judgment of absolute divorce from respondent herein and further seeking the legal care, custody and control of the minor children born of the marriage. Respondent was served with notice of the Texas proceedings but made no personal appearance therein. On June 18, 1980, petitioner obtained a judgment of final divorce from respondent herein and was granted the legal care, custody and control of the minor children born of the marriage.

On July 17, 1980, following the appropriate appeal delays in Texas, petitioner filed his present suit in the Twenty-eight Judicial District Court, LaSalle Parish, Louisiana, seeking recognition of the Texas divorce and custody decrees under the provisions of Article 2541 of the Louisiana Code of Civil Procedure. Respondent answered alleging that petitioner's Texas divorce and custody decree were invalid for lack of jurisdiction in the Texas Court. The trial on the merits was had on August 29, 1980, and judgment rendered by the District Court by written opinion on September 2, 1980, and read and signed on September 5, 1980, giving full faith and credit to, and making executory, all provisions of the Texas divorce decree except those relating to custody of the minor children.

Petitioner appealed the decision of the Twenty-eighth Judicial District Court in which the District Court had refused to give full faith and credit to the Texas custody decree to the Court of Appeal, Third Circuit, State of Louisiana, which rendered a split decision on May 27, 1981, in which the majority opinion sustained the action of the trial court holding that the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act, LSA-R.S. 13:1700 et seq, had altered prior Louisiana jurisprudence so as to allow the District Court to refuse to give full faith and credit under Article IV, Section 1 of the United States

Constitution to the final judgment of the Texas Court granting custody of the minor children to the petitioner herein.

Petitioner timely filed his motion for rehearing on June 24, 1981; however, rehearing was denied on July 8, 1981, with Judge LaBorde dissenting.

Petitioner then timely filed his application for a writ of review on August 10, 1981; however, the application was denied by the Supreme Court of the State of Louisiana on October 9, 1981.

## REASONS FOR GRANTING THE WRIT

### The decision below is in conflict with the full faith and credit clause of Article IV, Section 1 of the United States Constitution and has resulted in two conflicting final judgments in different states regarding which parent has custody of the two minor children.

By denying petitioner's application for a writ of review to the Third Circuit, Court of Appeal, State of Louisiana, the Louisiana Supreme Court has effectively affirmed the majority opinion which reasoned that the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act gives unto Louisiana the right to refuse to give full faith and credit to a custody decree rendered in a sister State if such a decree was not rendered in strict accordance with the procedural framework set forth in Louisiana's version of the Uniform Child Custody Jurisdiction Act. The majority opinion couches the legal issue presented by the facts of this case as follows:

> The precise issue presented is whether, under the Uniform Act, Louisiana is required to recognize an out-of-state custody decree rendered in a divorce proceedings, where the foreign custody decree is in conflict with a custody decree rendered in previous separation proceedings in Louisiana [Page 4 of majority opinion of Third Circuit.]

The dissenting opinion sets forth an entirely different view of the legal issue presented to the Court of Appeal, Third Circuit:

> I disagree that this is a child custody case involving application of the Uniform Child Custody Jurisdiction Act. It is instead a pure full faith and credit case posing the issue of whether Louisiana must recognize and give effect to the custody portion of a Texas judgment of divorce. Under Article 4, Section 1 of our United States Constitution, I am convinced that we must. [Page 1 of dissenting opinion.]

The majority opinion seeks to review these facts solely in the context of the procedural framework outlined by Louisiana's version of the Uniform Child Custody Jurisdiction Act without any regard whatsoever to the appropriate application of the Full Faith and Credit Clause of the United States Constitution. The majority sets forth the following statement of well-entrenched Louisiana jurisprudence and the effect thereon by the enactment of the Uniform Act:

> Prior to the adoption by Louisiana of the Louisiana Child Custody Jurisdiction Act, our jurisprudence had established the rule that a judgment of divorce, whether rendered in this State or in a foreign State with jurisdiction, abates a prior judgment of separation in this State and all matters incidental thereto including custody decrees. *Fountain v. Fountain*, 365 So.2d 1139 (La. App. 3rd Cir. 1978); *Webster v. Webster*, 308 So.2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill*, 304 So.2d 922 (La. App. 1st Cir. 1974); *Emery v. Emery*, 223 So.2d 680 (La. App. 4th Cir. 1969). Jurisprudence had also established the rule that a divorce decree and

> a custody decree incidental thereto rendered in a sister State with jurisdiction is entitled to full faith and credit in Louisiana. *Fountain v. Fountain*, supra; *Webster v. Webster*, supra; *Hill v. Hill*, supra; and *Emery v. Emery*, supra.
>
> If these jurisprudential rules are still controlling, the District Court in the present case erred in not recognizing the Texas custody decree, since the record clearly shows the Texas Court had jurisdiction of the custody of the children under the Texas law. Counsel for the father cited in his brief provisions of the Texas Family Code Annotated, Sec. 11.051, which states that Texas has jurisdiction of custody disputes where the child was conceived in Texas or the person on whom service is required has resided in Texas with the child. Also cited is *Butler v. Butler*, 577 SW2d 501 (Ct. of Civ. App. of Tex. 1978) which holds that where Texas was the last matrimonial domicile between the parents and the suit was commenced within two years after co-habitation in Texas ended, the minimum contacts necessary for Texas jurisdiction under its long-arm statutes are satisfied. Thus, Texas had jurisdiction under its laws. Likewise, there is no question that the Louisiana Court had jurisdiction under its laws to render the judgment of separation and custody decree in 1979. The mother was then domiciled in Louisiana and the children lived with her. (emphasis added) [Pages 2 and 3 of majority opinion.]

The majority opinion then goes into considerable detail to explain the motives for the enactment of the Uniform Child

Custody Jurisdiction Act by the Louisiana Legislature and the requirements in the act which are placed upon the State in cases of concurrent custody jurisdiction. The majority specifically finds that the Texas District Court failed to follow the prescribed procedural mechanism outlined in the Uniform Act. However, it must be noted that the Texas legislature had not enacted the Uniform Child Custody Jurisdiction Act, and, therefore, the Texas District Court was not required under Texas law to apply the provisions of the Uniform Child Custody Jurisdiction Act.

The Louisiana courts have ignored the Full Faith and Credit Clause of the United States Constitution in their opinions rendered in this matter. Article IV, Section 1 of the United States Constitution provides:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

This clause is implemented by 28 USC 1738 which sets out the manner for authenticating the documents for use in other States as follows:

> Such acts, records and judicial proceedings and copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken.

Article 2541 of the Louisiana Code of Civil Procedure sets forth the manner in which foreign judgments are made executory in the State of Louisiana as follows:

> A party seeking recognition or execution by a

> Louisiana Court of a judgment or a decree of a Court of the United States or Territory thereof, or of any other State, or of any foreign country, must bring an ordinary proceeding against the judgment debtor in the proper Louisiana Court, to have the judgment or decree recognized and made the judgment of the Louisiana Court.
>
> A duly authenticated copy of the judgment or decree must be annexed to the petition.

Petitioner herein filed his original petition to make foreign judgment executory in strict accordance with both State and Federal law and is therefore entitled to have the Texas custody decree recognized and made executory in the State of Louisiana under the Full Faith and Credit Clause of the United States Constitution.

In the recent United States Supreme Court of *Webb v. Webb*, 101 S.Ct. 1889 (1981), the Supreme Court was faced with an almost identical factual situation, and writs of certiorari were initially granted but later denied when it was determined that the petitioner had failed properly to raise or preserve her claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia Courts.

Justice White, delivering the opinion of the court, summarized the reason why this dispute had reached the United States Supreme Court as follows:

> This case involves a custody dispute between the mother and father of a minor child. Their dispute has reached this Court because the State Courts of Florida and Georgia have reached conflicting results in assigning custody of the child. (101 S.Ct. 1889, 1890)

The instant case involves the identical situation: Texas has granted custody of the two minor children to the father, and Louisiana has granted custody of the two minor children to the mother.

With regard to the issue of the propriety of the petitioner's full faith and credit claim, the Court held in *Webb*:

> Because this case comes to this Court from a State Court, the relevant jurisdictional statute is Title 28 U.S.C. 1257. As applied to the circumstances of this case, that statute requires that in the State Courts petitioner have "specially set up or claimed under the constitution (of) the United States" that right which he now seeks to have this Court enforce. 28 U.S.C. 1257 (3). Similarly, our Rule 21.1 (H) requires the petitioner to "specify the stage in the proceedings, both in the Court of the first instance and in the Appellate Court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court." Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia Courts.
>
> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that Court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts unless the aggrieved party in this Court can affirmatively show the contrary." (101 S.Ct. 1889, 1891)

Petitioner herein shows that his original petition filed in the Twenty-eighth Judicial District Court, LaSalle Parish, State of Louisiana, specifically requested that the Texas divorce decree be recognized and made executory under the provisions of Article 2541 of the Louisiana Code of Civil Procedure. Petitioner further shows that the District Court found that Louisiana had exclusive jurisdiction of the issue of custody of the minor children:

> I find, notwithstanding the rendition of a judgment of divorce between these litigants subsequent to the rendition of a judgment of separation in this Court, that this Court had and still has exclusive jurisdiction over the custody of Sunnydale Eicke and Christopher Eicke and that therefore, the 237th District Court of Texas did not possess jurisdiction over their custody on the 18th day of June, 1980. Therefore, while the divorce itself is entitled to recognition, the custody decree portions of the judgment are not entitled to recognition under Article 4, Section 1 of the Constitution of the United States or under Article 2541 of the Louisiana Code of Civil Procedure. [Pages 2 and 3 of the opinion of the Twenty-eighth Judicial District Court.]

Petitioner then appealed the decision of the Twenty-eighth Judicial District Court to the Court of Appeal, Third Circuit, State of Louisiana, specifically enumerating as one of the questions presented the following:

> Does the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act override the provisions of the full faith and credit clause of the United States Constitution?

As cited hereinabove, the majority opinion, on appeal, ignores the Full Faith and Credit Clause issue and holds instead that the failure of the Texas Court to apply the Uniform Child Custody Jurisdiction Act renders that judgment unenforceable in the State of Louisiana. However, the dissenting opinion emphatically challenges the majority's reasoning:

> I disagree that this is a child custody case involving application of the Uniform Child Custody Jurisdiction act. It is instead a pure full faith and credit case posing the issue of whether Louisiana must recognize and give effect to the custody portion of a Texas judgment of divorce. Under Art. 4, Sec. 1 of our United States Constitution, I am convinced that we must. [Page 1 of dissenting opinion.]

Petitioner applied for a writ of review to the Court of Appeal, Third Circuit listing the following specification of error:

> In holding that the adoption by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act, LSA-R.S. 13:1700 et seq, rescinded prior jurisprudence holding that a judgment of divorce and custody decree incidental thereto rendered in a sister State with jurisdiction was entitled to be given full faith and credit under the provisions of Article 4, Sec. 1 of the United States Constitution.

The Louisiana Supreme Court denied the application for writ of review on October 9, 1981, stating simply: "Denied. The result is correct."

Clearly then, petitioner has properly preserved his claim under the Full Faith and Credit Clause of the United States Constitution. The question then becomes whether this case presents either a factual or a legal situation which should be resolved by the United States Supreme Court. Petitioner urges that both requisites are more than adequately met as will be outlined herein below.

The most immediate problem is the conflicting custody decrees rendered by the Texas and the Louisiana Courts: Texas granting custody to the petitioner and Louisiana granting custody to the respondent. In the present context, the legal custody of the two minor children is dependent upon their location. If they are in Texas, petitioner is their legal guardian, and if they are in Louisiana, respondent is their legal guardian. As set forth in *Williams v. State of North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 213 (1942):

> The marriage relation creates problems of large social importance. Protection of offspring, property interest and the enforcement of martial responsibilities are but a few of commanding problems in the field of domestic relations with which the State must deal.
>
> ---
>
> This Court stated in *Atherton v. Atherton*, supra, 181 U.S. at P. 162, 21 S.Ct. at P. 547, 45 L.Ed. 794 that "a husband without a wife, or a wife without a husband, is unknown to the law." But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. We would then have what the Supreme Court of Illinois declared to be the "most perplexing and distressing complication in the domestic relations of many citizens in the different States." [317 U.S. 299, 63 S.Ct. 214]

As the Supreme Court so wisely enunciated above, a nation cannot have conflicting judgments as to the validity of a divorce. The instant case presents an equally perplexing and frustrating problem with regard to custody of children of divorced parents. Conflicting custody decrees would in-variably lead to significant emotional and psychological harm on the children and might be expected to lead to kidnapping and possible violence particularly under the circumstances of this case where legal custody would rest solely with the location of the children. In other words, the very fact of the conflicting decrees will enhance the probability that the parent without actual custody might attempt to "kidnap" the children and take them to the appropriate forum where his legal custody would be recognized. Should that occur, obviously the other party would then be encouraged to attempt the same sort of maneuver in hopes of returning the children to the forum where his custody would be recognized. Such a dangerous state of affairs simply cannot be tolerated.

Reviewing this case from the larger viewpoint, i.e., its possible impact upon interstate custody disputes, it becomes readily apparent that if Louisiana's approach, as outlined by the majority opinion of the Court of Appeal, Third Circuit, were allowed to stand, multiple conflicting custody decrees could be expected from various States. Louisiana has enacted the Uniform Child Custody Jurisdiction Act and Texas has not. Louisiana has made a requirement upon Texas Courts that those Texas Courts handle custody matters pursuant to the provisions of the Uniform Child Custody Jurisdiction Act in order for the Texas custody decrees to be given full faith and credit in Louisiana. Obviously such a requirement smacks of unconstitutionality and would reek utter havoc in domestic relations across the country. Texas is by no means the only State which has failed to adopt the Uniform Child Custody Jurisdiction Act. It is fair to assume that Louisiana would apply this same reasoning to custody decrees rendered in other States so as to have a means of refusing to give foreign custody decrees full faith and credit and thereby relitigate the merits of the prior foreign judgment. Just as obviously, if Louisiana is allowed to hide behind the Uniform Child Custody Jurisdiction Act so as to ignore the Full Faith and Credit Clause of the United States Constitution, then any other State could do likewise thus creating an utterly untenable situation with regard to custody of minor children throughout this nation.

In *Williams v. State of North Carolina*, 65 S.Ct. 1092, 1094, 325 U.S. 226, 229 (1945) the United States Supreme Court set forth the rule which is applicable hereto:

> But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia convention. 2 Farrand, the Records of the Federal Convention of 1787, 447, 485. "To give it the force of a judgment in another State, it must be made a judgment thereto." *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177. It can be made a judgment there only if the Court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the Court of the first State had power to pass on the merits — had jurisdiction, that is, to render the judgment.

Regarding the question of jurisdiction, the Court went on to state:

> The State of domiciliary origin should not be bound by an unfounded, if not collusive, recital in the record of a Court of another State. As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own

> unquestioned authority, to ascertain the truth or existence of that crucial fact. (65 S.Ct. 1092, 1095, 325 U.S. 226, 230)

The Louisiana Courts have recognized that Texas had jurisdiction over the parties to render the judgment of custody, and that finding is conclusive. Once it is determined that the Texas Court had jurisdiction, then Louisiana is required to give full faith and credit to the Texas decree. This is not, of course, to say that Louisiana cannot exercise its concurrent jurisdiction under the Uniform Child Custody Jurisdiction Act to modify the decree of another State; however, Louisiana cannot shield itself from the application of the United States Constitution by the enactment of local legislation. The doctrine of nullification has long since failed constitutional muster.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court and the Court of Appeal, Third Circuit, State of Louisiana.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this the 5 day of January, 1982, three (3) copies of the petition for writ of certiorari were mailed, postage prepaid, to Martin S. Sanders, Jr., P.O. Box 190, Winnfield, Louisiana 71483, counsel for respondent, and I further certify that all parties required to be served have been served.

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# Appendix

## APPENDIX

Petition to have foreign judgment made executory . . . . . . . . . . 27
Judgment in the 237th District Court of Lubbock County, Texas . . . . . . . . . . 29
Judgment of Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana . . . . . . . . . . 33
Opinion of the Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana . . . . . . . . . . 35
Majority Opinion of Court of Appeal, Third Circuit, State of Louisiana . . . . . . . . . . 39
Dissenting Opinion of Court of Appeal, Third Circuit, State of Louisiana . . . . . . . . . . 49
Denial of hearing . . . . . . . . . . 54
Denial of application for writ of review by Louisiana Supreme Court . . . . . . . . . . 55

Johnonnas Justus Eicke v. Elizabeth Larue Eicke

Docket Number 17062

28th Judicial District Court, LaSalle Parish, Louisiana

## PETITION TO HAVE FOREIGN JUDGMENT EXECUTORY

The petition of Johonnas Justus Eicke, a domiciliary of Synder, Texas, respectfully represents:

1.

The defendant is Elizabeth Larue Eicke who is domiciled in Olla, LaSalle Parish, Louisiana and who may be served at Louisiana Pacific Industries in Urania, Louisiana.

2.

Plaintiff and defendant were married on January 3, 1974, in Ketchikan, Alaska, and were divorced on June 18, 1980, in Lubbock County, Texas.

3.

Two children were born issue of this marriage, namely, Sunnydale J. Eicke, age four years, born March 23, 1976, and Christopher Allen Eicke, age two years, born July 22, 1978.

4.

By judgment of the Two Hundred Thirty-Seventh District Court of Lubbock County, Texas, rendered, read and signed on the 18th day of June, 1980, a copy of which duly certified in accordance with the Acts of Congress being attached hereto and made a part hereof, plaintiff herein was granted judgment in his favor and against the defendant dissolving the bonds of matrimony which had previously existed between them and decreeing a judgment of absolute divorce. By this same judgment the Court found and determined that the best interest of the children would be served if their custody was granted to plaintiff herein; accordingly, plaintiff was appointed managing conservator of the children under the laws of Texas to have all the rights, powers, duties and privileges of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties and powers granted to the possessory conservator named in this decree.

5.

Plaintiff hereby desires and is entitled to have this judgment of Two Hundred Thirty-Seventh District Court of Lubbock County, Texas, recognized as the judgment of this Court and made the judgment of this Court.

WHEREFORE, the premises considered, plaintiff herein prays that the defendant be cited to appear and answer this demand, after having been served with a copy of same and that after all legal delays and due proceedings had, there be judgment herein in favor of plaintiff, Johonnas Justus Eicke, and against defendant, Elizabeth Larue Eicke, recognizing the judgment of the Two Hundred Thirty-Seventh District Court of Lubbock County, Texas, and making said judgment the judgment of this Court, and, accordingly, that there be judgment herein in favor of plaintiff, Johonnas Justus Eicke and against defendant, Elizabeth Larue Eicke, granting unto plaintiff the care, custody and control of the minor children born of the marriage, Sunnydale J. Eicke and Christopher Allen Eicke, subject to the reasonable visitation privileges of defendant.

NELSON, HAMMONS & JOHNSON
s/John L. Hammons
John L. Hammons

705 Milam Street
Shreveport, LA 71101

ATTORNEYS FOR JOHONNAS JUSTUS EICKE

In the matter of the marriage of
Johonnas Eicke and Elizabeth Eicke

and

In the interest of
Sunnydale J. Eicke and Christopher Allen Eicke, Children

Docket No. 98557

In the 237th District Court of Lubbock County, Texas

## JUDGMENT

ON THIS, the 18th day of June, 1980, at a time previously set by this Court, final hearing was had in the above entitled and numbered cause. The Petitioner Johonnas Eicke appeared in person and by and through his attorney of record, and the Respondent Elizabeth Eicke, although duly and legally cited, failed to appear.

The Court, after examing the pleadings and listening to the evidence and argument of counsel, finds it has jurisdiction over this cause and the parties and that Petitioner's original petition for divorce has been on file in this cause for at least sixty days. The Court further finds that at the time the petition was filed, the Petitioner had been a resident of this state for at least six months next preceding the filing of this petition and a resident of Lubbock County for at least ninety days preceding the filing of the petition.

No jury having been demanded by either of the parties, all matters in controversy, including all questions of fact and of law were submitted to the Court for determination. The Court is of the opinion that the proven facts present adequate grounds for divorce and that the final judgment should be entered.

The Court finds and determines from the evidence that the marriage between Petitioner and Respondent has become insupportable because of discord in the marriage and conflict of personalities have destroyed the legitimate ends of the marriage relationship and prevent any reasonable expectation of reconciliation.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the bonds of matrimony between Petitioner Johonnas Eicke and Respondent Elizabeth Eicke be, and are hereby, dissolved and a decree of divorce is granted to Petitioner.

The Court further finds that there were two children born to the parties during the marriage relationship, to-wit:

Sunnydale J. Eicke, a male, born March 23, 1976, and
Christopher Allen Eicke, a male, born July 22, 1978,

and further finds that there were no other children born to or adopted by the marriage relationship and that Respondent is not now expecting a child.

The Court further finds that the children presently reside with the Respondent.

The Court finds and determines that the best interest of the children would be served if the Petitioner were appointed managing conservator of the children, to have all the rights, powers, duties, and privileges of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties, and powers granted to the possessory conservator named in this decree, AND IT IS SO ORDERED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Respondent Elizabeth Eicke shall be, and she is hereby, appointed possessory conservator of the children, to have the rights of reasonable visitation with the children, and Petitioner IS ORDERED to cooperate fully in effecting reasonable visitation of the children with their mother.

The Court further finds that the parties hereto have accumulated certain items of community assets and community debt during the marriage relationship and that the following is a just, proper, and equitable distribution of the assets and liabilities of the parties: Each party is awarded their personal items, including jewelry and clothing, savings and checking accounts standing in their respective names, retirement plans, and furniture and fixtures now in their possession. AND IT IS SO ORDERED. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all community assets set aside to either party are set aside subject to the indebtedness against them, and the party receiving said asset IS ORDERED to pay the obligation and to hold the other party harmless with respect to said debt or obligation. Each of the parties IS ORDERED to pay any obligations incurred by them since the date of separation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the parties hereto execute such documents and instruments as are necessary to effect the orders of this Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all costs of court incurred herein be assessed against Petitioner, for which let execution issue.

SIGNED AND ENTERED this 18th day of June, 1980.

s/John R. McFall
JUDGE PRESIDING
237TH DISTRICT COURT
LUBBOCK COUNTY, TEXAS

Johonnas Justus Eicke v. Elizabeth Larue Eicke
Docket Number 17,062
28th Judicial District Court, LaSalle Parish, Louisiana

## JUDGMENT

This cause having duly come on for trial on the merits, the law and evidence being found in favor thereof, and for reasons assigned in a written opinion dated September 2, 1980:

IT IS ORDERED, ADJUDGED AND DECREED that the judgment of divorce of the 237th District Court of Lubbocky County, Texas, rendered, read and signed on the 18th day of June, 1980, under docket number 98557 entitled "In the matter of the marriage of Johonnas Eicke and Elizabeth Eicke and In the interest of Sunnydale J. Eicke and Christopher Allen Eicke, Children," be and is hereby made executory except insofar as all provisions therein relating to custody which this Court specifically rejects recognition under Article 4, Section One of the Constitution of the United States or under Article 2541 of the Louisiana Code of Civil Procedure.

JUDGMENT RENDERED by written opinion on September 2, 1980.

JUDGMENT READ AND SIGNED on this the 5th day on September, 1980, in Jena, LaSalle Parish, Louisiana.

s/Edwin R. Hughes
DISTRICT JUDGE

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket No. 17,062

Twenty-Eighth Judicial District Court
State of Louisiana, LaSalle Parish

## REASONS FOR JUDGMENT

This is an action to enforce a child custody decree rendered in Texas. Plaintiff, Johonnas Eicke, obtained the Texas decree and contends that Louisiana law and the Full Faith and Credit clause of the Constitution of the United States make enforcement of the Texas decree mandatory. The defendant, Elizabeth Eicke, obtained a custody decree in this Court before the Texas decree was issued and she contends that the Texas Court did not have jurisdiction over the children and she contends it is therefore not eligible for Full Faith and Credit protection. It is my view that since the original custody decree was rendered, this court had and still has exclusive jurisdiction over custody of the subject children and that therefore plaintiffs demands should be denied as they relate to custody, but the divorce decree is otherwise recognized.

## FACTS

Plaintiff and defendant married on January 3, 1974 in Ketchikan, Alaska. They had two children of this marriage. Sunnydale Eicke was born on March 23, 1976 in Lubbock, Texas, and Christopher Eicke was born on July 22, 1978 in Snyder, Texas.

The litigants lived in Louisiana between December of 1978 and April of 1979. They then moved to Snyder, Texas where they lived together until August 9, 1979 when they separated in fact. Mrs. Eicke then moved back to Louisiana with her two children where she and they now live with her parents. On October 26, 1979 she instituted an action for separation in this Court and on December 14, 1979 a separation judgment was rendered. The record of those proceedings were introduced into evidence herein. This judgment granted to Mrs. Eicke the custody of her two children born of her marriage to Johonnas Eicke. In the separation proceeding, an attorney was appointed for Mr. Eicke and Mr. Eicke was given notice that the separation and custody proceedings were pending here. Therefore he had an opportunity to be heard on all issues including jurisdictional issues.

On June 18, 1980, Mr. Eicke obtained a divorce from Elizabeth Eicke in the 237th District Court of Texas. This judgment also awarded him custody of Sunnydale and Christopher and it is the judgment he now seeks to have enforced in this Court. The date on which he instituted the action for divorce was not established. However the judgment itself and the testimony elicited in this Court on August 29, 1980 make it clear that the children were in Louisiana continuously after Mrs. Eicke moved here in August 1979.

## LAW APPLICABLE TO THE CASE

The defendant has not briefed the law or argued the case extensively. Plaintiff relies upon the Full Faith and Credit Clause of the Constitution of the United States, Article 4, Section One; upon Article 2541 of the Louisiana Code of Civil Procedure, and upon *Cotton v. Wright*, 193 La. 520, 190 So. 665 (La. S.Ct. 1939); *Thornton v. Floyd*, 229 La. 237, 85 So. 2d 499 (La. S.Ct. 1956); and *Hill v Hill*, 304 So. 2d 922 (La. App. 1st Cir. 1974). Plaintiff's theory as it relates to Louisiana law is that the separation judgment and all incidental parts of it were completely abated by the subsequent divorce decree. Unquestionably, that was the law of Louisiana prior to October 1, 1978. On that date the Uniform Child Custody Jurisdiction Act (UCCJA) became effective in Louisiana. L.R.S. 13:1700, et. seq.

## CONCLUSIONS

All facts pertinent to this case occured after October 1, 1978, and this Court had jurisdiction for its initial custody determination under L.R.S. 13:1702.

The record before me makes it clear that the children were not in Texas when the 237th District Court undertook to modify the prior custody ruling of this Court, and it did not have jurisdiction over their custody. In addition, the Texas Court apparently was not called upon to and did not comply with L.R.S. 13:1720 or 13:1721 or UCCJA provisions similar to these articles. As of August 29, 1980, the State of Texas had not enacted the UCCJA or laws substantially similar to it.

The Louisiana jurisprudence concerning abatement of custody provisions of separation judgments has been modified by the Louisiana Legislature when it enacted the UCCJA. L.R S. 13:1711 provides that the parties are bound by custody decrees rendered in Louisiana Courts until such decrees are modified by a court functioning within the jurisdictional guidelines of the UCCJA.

L.R.S. 13:1712 also pertains to recognition of foreign custody decrees. It requires the Courts of Louisiana to enforce initial or modification decrees of courts of the other States, if they assumed jurisdiction under statutory provisions substantially similar to the UCCJA, which was not done in this case.

I find, notwithstanding the rendition of a judgment of divorce between these litigants subsequent to the rendition of a judgment of separation in this Court, that this Court had and still has exclusive jurisdiction over the custody of Sunnydale Eicke and Christopher Eicke and that therefore, the 237th District Court of Texas did not possess jurisdiction over their custody on the 18th day of June, 1980. Therefore, while the divorce itself is entitled to recognition, the custody decree portions of the judgment are not entitled to recognition under Article 4, Section One of the Constitution of the United States or under Article 2541 of the Louisiana Code of Civil Procedure.

s/Edwin R. Hughes
Edwin R. Hughes
District Judge

Jena, Louisiana
September 2, 1980

## Johonnas Justus Eicke v. Elizabeth Larue Eicke

## Docket Number 8135

## Court of Appeal, Third Circuit, State of Louisiana

Appeal from the Twenty-eighth Judicial District Court for the Parish of LaSalle, Judge Edwin R. Hughes presiding

Before Culpepper Domengeaux and Laborde, Judges

Culpepper, Judge

This is a child custody case. The plaintiff father appeals from a judgment denying recognition of that portion of a Texas divorce decree which awards the father custody of the two children at issue. In a previous Louisiana judgment of separation from bed and board, custody had been awarded to the mother. We conclude that under the Uniform Child Custody Jurisdiction Act, adopted by Louisiana in 1978, the trial judge correctly refused to recognize the Texas custody decree.

The facts are that plaintiff and defendant were married in Alaska during 1974. They later moved to Texas, where the two children, now ages two years and four years respectively, were born. In about 1978, the mother and father and the two children moved to Louisiana for a short time. In April of 1979, the entire family moved back to Texas. On August 9, 1979, the mother left the father in Texas and moved with the children to LaSalle Parish, Louisiana, where they have since lived near her mother. On October 26, 1979, the mother filed suit in LaSalle Parish for separation from bed and board and for custody of the children. An attorney was appointed to represent the absent husband, who was in Texas. On December 14, 1979, the district court for LaSalle Parish rendered judgment granting the mother a separation and custody of the children.

**Laborde, J. dissents and will assign written reasons.**

On June 18, 1980, the father obtained from the district court of Lubbock County, Texas a judgment granting him a divorce and custody of the two children, who were then still residing with their mother in Louisiana. The mother had been served with notice of the Texas proceedings but made no personal appearance therein.

On July 17, 1980, the father filed the present suit in LaSalle Parish, Louisiana for recognition of the Texas divorce and custody decree. The mother answered, alleging the father's Texas divorce and custody decree were invalid for lack of jurisdiction in the Texas court. Moreover, as to the Texas custody decree, the mother alleged it was invalid because of the prior Louisiana decree granting her custody.

The district court rendered judgment recognizing the Texas divorce but refusing to recognize the Texas custody decree. The trial judge reasoned that the Uniform Child Custody Jurisdiction Act, which was adopted by Louisiana in 1978 but has not been adopted in Texas, has changed the prior Louisiana jurisprudence regarding recognition of foreign custody decrees. We agree.

Prior to the adoption by Louisiana of the Uniform Child Custody Jurisdiction Act, our jurisprudence had established the rule that a judgment of divorce, whether rendered in this state or in a foreign state with jurisdiction, abates a prior judgment of separation in this state and all matters incidental thereto including custody decrees. *Fountain v. Fountain*, 365 So.2d 1139 (La. App. 3rd Cir. 1978); *Webster v. Webster*, 308 So.2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill*, 304 So.2d 922 (La. App. 1st Cir. 1974); *Emery v. Emery*, 223 So.2d 680 (La. App. 4th Cir. 1969). Jurisprudence had also established the rule that a divorce decree and a custody decree incidental thereto rendered in a sister state with jurisdiction is entitled to full faith and credit in Louisiana. *Fountain v. Fountain*, supra; *Webster v.*

*Webster*, supra; *Hill v. Hill*, supra; and *Emery v. Emery*, supra.

If these jurisprudential rules are still controlling, the district judge in the present case erred in not recognizing the Texas custody decree, since the record clearly shows the Texas court had jurisdiction of the custody of the children under the Texas law. Counsel for the father cited in his brief provisions of the Texas Family Code Annotated, Sec. 11.051, which states that Texas has jurisdiction of custody disputes where the child was conceived in Texas or the person on whom service is required has resided in Texas with the child. Also cited is *Butler v. Butler*, 577 SW 2d 501 (Ct. of Civ. App. of Tex. 1978) which holds that where Texas was the last matrimonial domicile between the parents and suit was commenced within two years after cohabitation in Texas ended, the minimum contacts necessary for Texas jurisdiction under its long-arm statutes are satisfied. Thus, Texas had jurisdiction under its laws. Likewise, there is no question that the Louisiana court had jurisdiction under its laws to render the judgment of separation and custody decree in 1979. The mother was then domiciled in Louisiana and the children lived with her.

Under the jurisprudential rules stated above, the Texas custody decree is entitled to recognition unless these rules were changed by the Uniform Child Custody Jurisdiction Act. The precise issue presented is whether, under the uniform act, Louisiana is required to recognize an out-of-state custody decree rendered in a divorce proceeding, where the foreign custody decree is in conflict with a custody decree rendered in previous separation proceedings in Louisiana. We find no Louisiana case addressing this particular question. However, in the recent case of Revere v. Revere, ______ So. 2d ______ (La. 1980), our Supreme Court explained the purposes of the Uniform Child Custody Jurisdiction Act. In Revere, the matrimonial domicile was in Louisiana. The mother abandoned the father and child and moved to Texas. The father obtained a judgment of separation and later a judgment of divorce in Louisiana awarding him custody. The father lived in Louisiana with his parents who helped him take care of the child. The father was killed, giving rise to a claim by the child for his wrongful death in Louisiana. After the father's death, the mother came to Louisiana and took physical control of the child from the paternal grandparents and obtained an ex parte custody order in Louisiana. The mother took the child back to Texas where she had remarried. After the child had been Texas about six months, the paternal grandparents filed in Louisiana a rule to change custody to them, alleging the mother's unfitness and forfeiture of parental rights. The mother excepted to the Louisiana court's jurisdiction. Our Supreme Court held that the Louisiana court had jurisdiction under the Uniform Child Custody Jurisdiction Law, both because Louisiana was the child's "home state", within the meaning of LSA-R.S. 13:1702A(1), and because the child and the persons seeking custody had significant connections with this state and there was available in this state substantial evidence concerning the child's present or future care, LSA-R.S. 13:1702A(2). In discussing the general purposes of the Uniform Act, the court states:

> "The Uniform Child Custody Jurisdiction Law was proposed in an effort to have states impose uniform legislative rules on themselves regarding jurisdiction in child custody cases. A custody decree in one state is subject to modification not only by the courts of that state, but also by the courts of another state, since the Full Faith and Credit clause has limited application in custody cases. New York ex rel. *Halvey v. Halvey*, 330

> U.S. 610 (1947). In an age of fluid population trends many cases are presented in which jurisdiction may be concurrent in several states. In order to provide some stability to reasoned custody decrees by discouraging relitigation, to deter custody determinations by physical abduction, to avoid jurisdictional competition and conflicting custody decrees in several states, and primarily to attain the security of home environment necessary for a child's well being, the National Conference of Commissioners proposed the uniform law adopted in Louisiana by Act 513 of 1978. See R. S. 13:1700. At that time numerous other states had adopted the uniform law."

In Revere, the Supreme Court made the following statement which has particular application to the present case:

> "It is evident that jurisdiction may exist in two different states under the home state and significant connection standards. When this occurs, it is not necessary that the significant connection state defer in every case to the home state.[3] The conflict is avoided by reference to priority of filing (see R.S. 13:1705), which requires a court with jurisdiction under the uniform law to defer to the court of another state with uniform law jurisdiction when the first proceeding was filed in the latter state) and to factors indicating Louisiana is an inconvenient forum (see R.S. 13:1706, which encourages judicial restraint when another state with jurisdiction under the uniform law appears to be in a better position to determine custody).
>
> ---
>
> "3. Texas has not enacted the uniform law. The act, however, is not a reciprocal act, and by

> adopting the uniform law, Louisiana has obligated itself to adhere to the terms of the act even though the other concerned state has not done so."

Revere, supra, is similar to the present case in that both Texas and Louisiana had jurisdiction, but the present case differs from Revere in that here custody decrees have been rendered in both states, first in Louisiana and then in Texas, whereas in Revere the only custody proceedings filed were in Louisiana.

Before discussing the conflicting custody decrees from Texas and from Louisiana, we note that LSA-R.S. 13:1701(4) defines a "custody decree" as a "custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree." Section 1701 (3) defines a "custody proceeding" as including a proceeding "in which a custody determination is one of several issues, such as an action for divorce or separation." Thus, insofar as custody decrees are concerned, the prior jurisprudential rule, cited above, that a judgment of divorce abates a prior judgment of separation and all matters incidental thereto, including custody decrees, is changed by the Uniform Child Custody Jurisdiction Act. Under the Uniform Act, the Louisiana court which renders a custody decree in a separation proceedings need not necessarily defer to a subsequent custody decree rendered in a divorce proceedings in another state.

In Revere, supra, our Supreme Court points out that the Uniform Law seeks to solve the problem of conflicting custody decrees from different states, both of which have jurisdiction. The court notes LSA-R.S. 13:1705 which provides:

> **"§ 1705.**
>
> **Simultaneous proceedings in other states**
>
> A. A court of this state shall not exercise its

jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Part, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

B. Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under Section 1708 and shall consult the child custody registry established under Section 1715 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

C. If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with Sections 1718 through 1721. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate

> forum.
>
> Added by Acts 1978, No. 513, § 1,eff. Oct 1, 1978."

Of particular relevance to the issue in the present case are the provisions of LSA-R.S. 13:1712 which state:

> "§ 1712.
>
> **Recognition of out-of-state custody decrees**
>
> The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Part or which was made under factual circumstances meeting the jurisdictional standards of the Part, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act."

Under LSA-R.S. 13:1712, quoted above, the courts of Louisiana must recognize an initial or modification decree of a court of another state "which had assumed jurisdiction under statutory provisions substantially in accordance with this part (meaning the Uniform Law) or which was made under factual circumstances meeting the jurisdictional standards of the part." As stated above, Texas has not adopted the Uniform Law. If the Uniform Law had been in effect in Texas at the time the father sought custody there, the Texas court would have been bound to follow the procedures set out in LSA-R.S. 13:1705, quoted above, and also to follow generally the provisions of Sections 1706-1710. This means that the Texas court should have discovered the existing custody decree rendered in Louisiana about six months previously, should have obtained a copy of the proceedings in Louisiana and other information supplied by the parties, should have informed the Louisiana courts of the institution of custody proceedings in Texas, and, in general, should have cooperated with the Louisiana court in determining the most convenient forum for gathering evidence and the court best suited to decide the custody dispute. Insofar as the record before us shows, the Texas court did none of these things. Therefore, the Texas custody decree was not rendered substantially in accordance with the provisions of the uniform law and need not necessarily be recognized by the courts of Louisiana. LSA-R.S. 13:1712.

*Moore v. Moore*, 379 So.2d 1153 (La. App. 2nd Cir. 1980), involved the Uniform Law, but not the precise issue presented here. In Moore, a mother divorced under a New Mexico judgment sought in a Louisiana court reduction of the father's visitation rights granted in the New Mexico decree. The district court in Louisiana sustained the father's exception to the jurisdiction. The Second Circuit Court of Appeal held that Louisiana had jurisdiction to modify the New Mexico decree, where the child and the mother resided in Louisiana and the only remaining connection of the parties with New Mexico was the father's residence there. The question in Moore was simply whether Louisiana had jurisdiction to modify the New Mexico decree. Clearly, the Louisiana court did have such jurisdiction, as all custody decrees are always subject to modification because of changed circumstances. See Revere, supra. However, the court in Moore discussed generally the purposes and rationale of the Uniform Act, in much the same manner as set forth by the Supreme Court in Revere. See also the Legislative Symposium, 39 L. Law Rev. 107, which discusses generally the provisions of the Uniform Act.

Looking at the present case generally, in light of the purposes of the uniform law, it would clearly be contrary to the spirit of the act to allow the father to go into a Texas court and obtain a custody decree, where the mother and children were living in Louisiana and the Louisiana court had already rendered a decree giving custody to the mother. The action by the father in obtaining the Texas decree resulted in precisely the kind of conflict between custody decrees of different states which the Uniform Act seeks to suppress.

For the reasons assigned, the judgment appealed is affirmed. All costs of this appeal are assessed against the plaintiff-appellant.

AFFIRMED.

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket No. 8135

Court of Appeal, Third Circuit, State of Louisiana

On appeal from the Twenty Eighth Judicial District Court, Parish of LaSalle, State of Louisiana; the Honorable Edwin R. Hughes, Judge, Presiding.

Before Culpepper, Domengeaux and Laborde, Judges.

Laborde, Judge, dissenting.

I disagree that this is a child custody case involving application of the Uniform Child Custody Jurisdiction Act. It is instead a pure full faith and credit case posing the issue of whether Louisiana must recognize and give effect to the custody portion of a Texas judgment of divorce. Under Art. 4, Sec. 1 of our United States Constitution, I am convinced that we must.

Plaintiff-father filed this suit to have a Texas judgment awarding him custody of his two children recognized and made executory in Louisiana. The defendant-mother answered and reconvened, arguing invalidity of the judgment based on the Texas court's lack of jurisdiction. From a decision in favor of the mother, the father appeals.

The facts are sufficiently set forth in the majority opinion.

As stated above, the only issue presented on appeal is whether Louisiana must give full faith and credit to the custody portion of the Texas decree.

The United States Constitution mandates that the courts of Louisiana shall give full faith and credit to judgments of the courts of our sister states unless it is shown that the rendering court lacked jurisdiction over the subject matter or parties of the litigation. U.S.C.A. Const. Art. 4, Sec. 1, LSA-C.C.P. Art. 1; *Magnolia Petroleum Company v.*

*Hunt*, 320 U.S. 430, 64 S.Ct. 208, 88 L.Ed. 149 (1943); *Holden V. Holden*, 374 So.2d 749 (La. App. 3rd Cir. 1979). The result is that in a proceeding for the recognition of a foreign judgment, the only issue which a Louisiana court may concern itself with is whether or not the foreign court had jurisdiction to make such an award. *Williams v. State of North Carolina*, 325 U.S. 226 (1945); *Holden v. Holden*, supra. If it did, Louisiana is without power or discretion to deny giving the foreign judgment full faith and credit.

There is a presumption that a court of a sister state had jurisdiction sufficient to render judgment in a case before it and the assailant of the judgment bears the heavy burden of proving otherwise. *Berry v. Berry*, 307 So.2d 821 (La. App. 3rd Cir. 1975); *Holden v. Holden*, supra. The burden to establish that the foreign court was without jurisdiction can only be discharged by clear and positive proof. *Turpin v. Turpin*, 175 So.2d 357 (La. App. 2nd Cir. 1965); *Holden v. Holden*, supra.

The defendant, Elizabeth Eicke, attacks the judgment in the present case and she bears the burden of proving, by clear and positive evidence, that the Texas court lacked jurisdiction when it rendered the custody award. The law utilized to determine whether the foreign court had jurisdiction is the law of the foreign state rendering the judgment. *Fountain v. Fountain*, 365 So.2d 1139 (La. App. 3rd Cir. 1978).

The attorney for Johonnas, in brief, offered the following law and jurisprudence regarding jurisdiction over custody matters in Texas courts:

> "With regard to the statutory authority for the Texas court to obtain jurisdiction over the parties, it is shown that the Texas Family Code Annotated Section 11.051 provides in pertinent part:

In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over the person's personal representative, although the person is not a resident or domiciliary of this State if:

(1) the child was conceived in this State and the person on whom service is required is a parent or an alleged or probable father of the child;
(2) the child resides in this State as defined by Section 11.04 of this code, as a result of the acts or directives or with the approval of the person on whom service is required;
(3) the person on whom service is required has resided with the child in this State; or
(4) notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the Constitution of this State or of the United States for the exercise of personal jurisdiction.

In *Butler v. Butler*, 577 S.W.2d 501 (Court of Civil Appeals of Texas, 1978), the court held that where Texas was the last state in which marital cohabitation between the parties occurred and suit was commenced within two years after the date on which cohabitation ended, minimum contacts necessary for Texas to exercise long-arm jurisdiction over the husband were present and where the parents and child had been long-time residents of Texas and it was only shortly before suit was filed that the husband left with the minor daughter, the Texas court was justified in exercising long-arm jurisdiction and substituted service on the husband's attorney outside the state by certified mail with a return receipt requested and this was reasonably calculated to give the husband

> notice of the suit and satisfied all due process requirements." (Appellant's Brief pp. 11-12)

By way of contrast, attorney for Mrs. Eicke failed, at trial and on appeal, to introduce any evidence of the law of Texas with respect to jurisdiction over custody matters.

In addition to the law and jurisprudence cited by Johannas and the lack of any citation on the part of Mrs. Eicke, the Texas court in its judgment, specifically stated:

> ". . . after examining the pleadings and listening to the evidence and argument of counsel, (the Court) finds it has jurisdiction over the cause and the parties . . ."

Upon review, the record supports that the Texas court had jurisdiction to determine custody under several of the sections of its law and also under the jurisprudence cited above, a fact not disputed by the majority who concedes that "the record clearly shows the Texas court had jurisdiction of the custody of the children under the Texas law." Under our constitution, after finding that the rendering court had jurisdiction, the limited inquiry permitted must end and the judgment is entitled to full faith and credit, period.

The majority, ignoring the reality of the valid Texas judgment, errs by failing to acknowledge that this is a full faith and credit case and by failing to restrain itself accordingly. Instead, the majority proceeds to treat the case as one involving application of the Uniform Child Custody Jurisdiction Act which Louisiana, but not Texas, has adopted. Upon review, the majority concludes "looking at the present case generally, in light of the purposes of the uniform law, it would clearly be contrary to the spirit of the act to allow the father to go into a Texas court and obtain a custody decree, where the mother and children were living in Louisiana and the Louisiana Court had already rendered a decree giving custody to the mother." In support of its position, the majority cites the Revere case. Revere is inapplicable for the simple reason that it was not a full faith and credit case.

In conclusion, I am not convinced that Louisiana, by adopting the Uniform Child Custody Jurisdiction Act may effectively "amend" the full faith and credit clause of the United States Constitution.

For the foregoing reasons, I respectfully dissent.

**COURT OF APPEAL, THIRD CIRCUIT**
STATE OF LOUISIANA
OFFICE OF THE CLERK
Lake Charles, La., July 8, 1981

Dear Sir:

Rehearing was this day refused in the case entitled
Johannas Justus Eicke v. Elizabeth L. Eicke
No. 8135

Cordially yours,
KENNETH J. de BLANC, Clerk

**Laborde, J. votes to grant**

## THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHONNAS JUSTUS EICKE
VERSUS NO. 81-C-2109
ELIZABETH LARUE EICKE

Re: Johonnas Justus Eicke, applying for Certiorari, or writ of Review, to the Court of Appeal Third Circuit, Parish of LaSalle, Number 8135.

October 9, 1981

Denied. The result is correct.

HTL
JAD
PFC
WFM
JLD
FAB
JCW

Supreme Court of Louisiana
October 9, 1981

s/Franz J. Labranche, Jr.
Clerk of Court
For The Court

# Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 6 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1284

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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JOHONNAS JUSTUS EICKE, Petitioner,
v.
ELIZABETH LARUE EICKE, Respondent.

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**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS, THIRD CIRCUIT
STATE OF LOUISIANA**

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# JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 4, 1982
CERTIORARI GRANTED MAY 17, 1982

# INDEX

Chronological List of Relevant Docket Entries .................. 3

Judgment of Separation in Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana .............................. 10

Petition to have foreign judgment made executory .............................. 11

Judgment in the 237th District Court of Lubbock County, Texas .................. 12

Judgment of Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana ........... 13

Opinion of the Twenty-eighth Judicial District Court, LaSalle Parish, Louisiana .... 14

Majority Opinion of Court of Appeal, Third Circuit, State of Louisiana ........... 15

Dissenting Opinion of Court of Appeal, Third Circuit, State of Louisiana ........... 16

Denial of rehearing .............................. 17

Denial of application for writ of review by Louisiana Supreme Court ............... 18

Certificate of Service ........................... 19

# CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 30, 1979
Jena, Louisiana

Court opened at 9:30 a.m., according to law, and the following business was conducted:

No. 16,401 — Elizabeth Larue Hayhurst Eicke vs. Johannas Justus Eicke

Petition for separation from bed and board filed; order signed appointing Patrick Durusau to represent the absentee or non-resident defendant and granting to Elizabeth Larue Hayhurst Eicke the temporary care, custody, and control of the minor children, Sunnydale J. Eicke and Christopher Allen Eicke, until further order of this Court.

Order signed and filed.

Court adjourned at 10:30 a.m.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * *

Jena, Louisiana
December 14, 1979

Court opened at 9:40 a.m., according to law and the following business was conducted:

No. 16,401 — Elizabeth Larue Hayhurst Eicke v. Johonnas Justus Eicke

This case came on for hearing on instanter setting. Present were the plaintiff, and her attorney, Martin S. Sanders, Jr.; defendant was not present but was represented by attorney ad hoc Patrick L. Durusau.

Evidence was introduced and the matter submitted, and there is judgment herein in favor of plaintiff, Elizabeth Larue Hayhurst Eicke, and against the defendant, Johonnas Justus Eicke, decreeing a separation from bed and board between the parties, and granting unto the plaintiff and mother the permanent care, custody and control of the minor children born of said marriage; namely, Sunnydale J. Eicke and Christopher Allen Eicke.

Further, the plaintiff is reserved the right to proceed herein to obtain a personal judgment agains the defendant for alimony and to secure a partition of property belonging to the community of acquets and gainst.

Judgment rendered, signed and filed; see decree.

Court adjourned at 11:15 a.m.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * * *

Jena, Louisiana
July 3, 1980

Court opened at 9:15 a.m. and the following business was conducted:

No. 16,40 — Elizabeth Larue Hayhurst Eicke vs. Johannas
Justus Eicke

Case was set for 10:00 a.m. At 10:18 a.m. case was called and there were no appearances made. Case passed.

Court adjourned at 1:35 p.m.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * * *

Jena, Louisiana
August 29, 1980

Court opened at 9:35 a.m. according to law, and the following business was conducted:

No. 17,062 — Johonnas Justus Eicke v. Elizabeth Larue Eicke

This case came before the court for hearing on Rule pursuant to assignment. Atty. John L. Hammons was present with Plaintiff and Atty. Herman A. Castete was present with defendant. Atty. Castete offered and filed into the record a Premptory Exception of Res Judicata and a Memorandum of Authorities in Open Court. Atty. Castete offered by reference suit 16,401. Testimony of Johonnas Justus Eicke is heard by the Court. Atty. Hammons offers original birth certificates of Sunnydale J. Eicke and Christopher Allen Eicke. On oral request of Atty. Hammons, Court orders Clerk to make copies of the original certificates and return the originals to Atty. Hammons. P-1 (Copy of Certificate of Birth of Christopher A. Eicke) and P-2 (Copy of Certificate of Birth of Sunnydale J. Eicke) are filed as exhibits. Atty. Hammons offers as exhibit the copy of the Judgment signed June 18, 1980 in 237th District Court, Lubbock County, Texas. Plaintiff rests. Testimony of Elizabeth Eicke is heard by the Court. Defense rests. Arguments of Counsel heard by Court. The case is taken under advisement of the Court at this time with Reasons for Judgment to be filed at a later date. Atty. Hammons requests the Court issue an order to assure the children are still in the jurisdiction of this Court in the event the Court rules in favor of Plaintiff. Defense counsel advised the Court he had no objection to such an order. Atty. Hammons is to present the order to the Court for signing at a later date.

Court adjourned.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * * *

Jena, Louisiana
September 5, 1980

Court opened at 9:40 a.m. and the following business was conducted:

No. 17,002 — Johonnas Justus Eicke v. Elizabeth Larue Eicke

Judgment rendered on September 2, 1980 was signed and filed.

Court adjourned at 3:25 p.m.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * * * *

Jena, Louisiana
September 26, 1980

Court opened at 9:35 a.m. and the following business was conducted:

No. 16401 — Elizabeth Larue Hayhurst Eicke v. Johonnas Justus Eicke

No. 17062 — Johonnas Justus Eicke v. Elizabeth Larue Hayhurst Eicke

This case came on for hearing on rule for Child Support and Alimony filed on behalf of Elizabeth Larue Hayhurst Eicke, for hearing on rule for Specification of Visitation Rights filed on behalf of Johonnas Justus Eicke and for trial on the merits, pursuant to assignment. Present in Open Court were Atty. Martin S. Sanders with Elizabeth Larue Hayhurst and Atty. John Hammons with Johonnas Justus Eicke. Atty. John Hammons, on behalf of plaintiff, Johonnas Justus Eicke, filed into Suit No. 17,062 Answers to Interrogatories propounded to Plaintiff. At this time Atty. Martin Sanders moves to consolidate the two cases. No objection is made by opposing counsel and Court ordered consolidation of suit no. 16401 and no. 17062. Testimony of Johonnas Justus Eicke and Elizabeth Hayhurst Eicke is heard by the Court. Exhibit D-1 (certified copy of citation showing service of Texas divorce petition on Elizabeth Hayhurst Eicke) is offered and filed on behalf of Johonnas Justus Eicke in Exhibit D-2 (Affidavit of income and expenditures of Johonnas Justus Eicke) is offered and filed on behalf of Johonnas Justus Eicke. On Rebuttal, testimony of Mr. B.W. Hayhurst is heard by the Court. Court ordered counsel to submit briefs within 30 days or before October 26, 1980 and ordered Atty. John Hammons to forward to this Court a certified copy of all the pleadings in the Texas case. It is the further order of the Court that Johonnas Justus Eicke be allowed one hour visitation with the minor children this date out of the presence of Elizabeth Eicke with the condition he not take the minors out of the city limits of Olla. Court takes these matters under advisement.

Court adjourned at 11:55 a.m.

APPROVED: s/Edwin R. Hughes, District Judge

* * * * * * * * * * * * * * * * * * * * *

Johonnas Justus Eicke v. Elizabeth Larue Hayhurst Eicke

Docket Number 16,401

28th Judicial District Court, LaSalle Parish, Louisiana

## JUDGMENT

This cause having come on for hearing pursuant to assignment. Plaintiff herein being represented by her attorney, Martin S. Sanders, Jr., and the defendant appearing by answer and court appointed counsel; the court considering the plaintiff having made due proof of her demands and for the reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Elizabeth Larue Hayhurst Eicke, and against the defendant, Johonnas Justus Eicke, decreeing a separation from bed and board between the parties, and granting unto the plaintiff and mother the permanent care, custody and control of the minor children born of said marriage, namely, Sunnydale J. Eicke and Christopher Allen Eicke.

FURTHER the plaintiff is reserved the right to proceed herein to obtain a personal judgment against the defendant for alimony and to secure a partition of property belonging to the community of acquets and gains.

JUDGMENT RENDERED and SIGNED at Jena, Louisiana on this the 14th day of December, 1979.

s/Edwin R. Hughes, District Judge

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket Number 17062

28th Judicial District Court, LaSalle Parish, Louisiana

## PETITION TO HAVE FOREIGN JUDGMENT EXECUTORY

(The body of this pleading may be found at page 27 of Petitioner's Application for Writ of Certiorari)

In the matter of the marriage of
Johonnas Eicke and Elizabeth Eicke
and
In the interest of
Sunnydale J. Eicke and Christopher Allen Eicke, Children
Docket No. 98557
In the 237th District Court of Lubbock County, Texas

## JUDGMENT

(The body of this pleading may be found at page 29 of Petitioner's Application for Writ of Certiorari)

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket Number 17,062

28th Judicial District Court, LaSalle Parish, Louisiana

## JUDGMENT

(The body of this pleading may be found at page 33 of Petitioner's Application for Writ of Certiorari)

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket No. 17,062

Twenty-Eighth Judicial District Court

State of Louisiana, LaSalle Parish

## REASONS FOR JUDGMENT

(The body of this pleading may be found at page 35 of Petitioner's Application for Writ of Certiorari)

Johonnas Justus Eicke v. Elizabeth Larue Eicke
Docket Number 8135
Court of Appeal, Third Circuit, State of Louisiana
Appeal from the Twenty-eighth Judicial District Court for the Parish of LaSalle, Judge Edwin R. Hughes presiding
Before Culpepper, Domengeaux and Laborde, Judges

## OPINION

(The body of this pleading may be found at page 39 of Petitioner's Application for Writ of Certiorari)

Johonnas Justus Eicke v. Elizabeth Larue Eicke

Docket No. 8135

Court of Appeal, Third Circuit, State of Louisiana

On appeal from the Twenty Eighth Judicial District Court, Parish of LaSalle, State of Louisiana; the Honorable Edwin R. Hughes, Judge, Presiding.

Before Culpepper, Domengeaux and Laborde, Judges.

## DISSENTING OPINION

(The body of this pleading may be found at page 49 of Petitioner's Application for Writ of Certiorari)

**COURT OF APPEAL, THIRD CIRCUIT**
STATE OF LOUISIANA
OFFICE OF THE CLERK
Lake Charles, La., July 8, 1981

Dear Sir:

Rehearing was this day refused in the case entitled
Johonnas Justus Eicke v. Elizabeth Larue Eicke
No. 8135

Cordially yours,
KENNETH J. de BLANC, Clerk
**Laborde, J. votes to grant**

## THE SUPREME COURT OF THE STATE OF LOUISIANA

JOHONNAS JUSTUS EICKE
VERSUS NO. 81-C-2109
ELIZABETH LARUE EICKE

Re: Johonnas Justus Eicke, applying for Certiorari, or writ of Review, to the Court of Appeal Third Circuit, Parish of LaSalle, Number 8135.

October 9, 1981

Denied. The result is correct.

HTL
JAD
PFC
WFM
JLD
FAB
JCW

Supreme Court of Louisiana
October 9, 1981

s/Franz J. Labranche, Jr.
Clerk of Court
For The Court

## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the Joint Appendix were mailed, postage prepaid, to Martin S. Sanders, Jr., P.O. Box 190, Winnfield, Louisiana 71483, counsel for respondent, and I further certify that all parties required to be served have been served.

John L. Hammons

NELSON, HAMMONS & JOHNSON
705 Milam Street
Shreveport, Louisiana
COUNSEL FOR PETITIONER

# Opposition

Supreme Court, U.S.
FILED
APR 20 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1284

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

**JOHONNAS JUSTUS EICKE,**
**Petitioner,**

versus

**ELIZABETH LARUE EICKE,**
**Respondent.**

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Martin S. Sanders, Jr.
Martin S. Sanders, III
SANDERS & CASTETE, LTD.
A PROFESSIONAL LAW
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Post Office Box 190
Winnfield, Louisiana 71483
(318) 628-6971
COUNSEL FOR RESPONDENT

OF COUNSEL:
Kent McKeever
Fordham University School
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140 West 62nd Street
New York, New York 10023

# QUESTION PRESENTED

Whether Louisiana, in recognizing a final judgment of divorce rendered by a Texas court, must also recognize that judgment's accompanying custody decree under the provisions of Article IV, Section 1 of the United States Constitution.

# INDEX

Page

Question presented . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . i

Citations . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . iii

Statement of facts . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .1

Reasons Why the Petition for a Writ of Certiorari should be denied . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2

The Decision of the Louisiana Courts Denying Recognition to the Custody Decree Accompanying the Foreign Divorce Judgment is Well-Supported by the Previous Decisions of This Court and Presents no Conflict With Those Decisions . . . . . . . . . . . .2

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .5

Certificate of Service . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .6

# CITATIONS

Page

*Cases:*

*Kovaks v. Brewer*, 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958) . . . . . . . . . . . . . . . . . . . . . . . . . . .3

*May v. Anderson*, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953) . . . . . . . . . . . . . . . . . . . . . . . . . . . . .3, 4

*New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947) . . . . . . . . . . . . . . . . .3

*Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456 (1957) . . . . . . . . . . . . . . . . . . . . . .4

NO. 81-1284

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHONNAS JUSTUS EICKE,
Petitioner,

versus

ELIZABETH LARUE EICKE,
Respondent.

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT, STATE OF LOUISIANA

## STATEMENT OF FACTS

Petitioner and respondent were married in ketchikan, Alaska on January 3, 1974. Subsequent to the marriage, petitioner and respondent resided in Louisiana and eventually in Texas; two children were born of the marriage. Petitioner and respondent last lived together in Texas from April until August of 1979. In August of 1979 the respondent and the two children left Texas, moved to LaSalle Parish, Louisiana, and established Louisiana as their domicile. Respondent filed suit in the Twenty-eighth Judicial District Court, State of Louisiana seeking a separation from the petitioner and custody of the two children; judgment to that effect was rendered on December 14, 1979.

In July of 1980 the petitioner, who had not appeared in the previous suit for separation, brought an action in the

Twenty-eighth Judicial District Court, State of Louisiana, seeking recognition of a Texas judgment of divorce and its accompanying custody decree. The Twenty-eighth Judicial District Court recognized the Texas judgment of divorce and made the same executory; the court denied recognition to the Texas custody decree.

The decision by the Twenty-eighth Judicial District Court was appealed by petitioner to the Court of Appeal, Third Circuit, State of Louisiana; a majority opinion of that Court affirmed the decision of the trial court. Petitioner's request for a rehearing was denied on July 8, 1981. On October 9, 1981, the Supreme Court of the State of Louisiana unanimously denied petitioner's application for a writ of review.

## REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

**The decision of the Louisiana courts denying recognition to the custody decree accompanying the foreign divorce judgment is well-supported by the previous decisions of this Court and presents no conflict with those decisions.**

The petitioner complains that the Court of Appeal, Third Circuit, State of Louisiana has, by its decision recognizing that the adoption of the Uniform Child Custody Jurisdiction Act 1/ has abrogated the former Louisiana jurisprudential rule that a judgment of divorce abates all incidents of a previous separation judgment, denied the foreign custody decree that was sought to be enforced full faith and credit under Article IV, Section 1 of the United States Constitution. Petitioner's is based on a phrase picked out of the majority opinion in which the court states that Texas had jurisdiction under its laws. Petitioner asserts that the Louisi-

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1/ **Louisiana Revised Statutes 13:1700 through 13:1724.**

ana court has only denied recognition to the Texas custody decree because the Court of Appeal found such a change in the jurisprudence. Petitioner's argument fails to address the proposition that Louisiana could deny recognition to the foreign custody decree regardless of the existence of a previous decree of custody in Louisiana.

In a series of cases, this Court has set out the exceptions which exist, in regard to custody decrees, to full faith and credit. In *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947), the Court noted that the state of the forum has at least as much leeway to disregard the foreign judgment, to qualify or modify it, as does the state which rendered it. Concerning custody decrees embodied in a foreign *ex parte* divorce, the Court has held that where a decree was rendered without personal jurisdiction over the noncustodial parent, it was not entitled to full faith and credit. *May v. Anderson,* 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1953). The similarity of the facts in *May, supra,* to those of the instant case is pronounced. In that case the mother left Wisconsin with the children, and her husband obtained a divorce and custody decree in Wisconsin, serving his wife under the Wisconsin matrimonial long-arm provision.

In his concurrence in *May, supra,* Justice Frankfurter pointed out the inappositeness of full faith and credit clause to custody determinations. 345 U.S. at 356, 73 S.Ct. at 844, 97 L.Ed. at 1228. This position was more fully developed by Justice Frankfurter in *Kovaks v. Brewer,* 356 U.S. 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958):

> The minimum nexus between court and child that must exist before the court's award of the child's custody should carry any authority is that the court should have been in a position adequately to inform itself regarding the

> needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment. 356 U.S. at 614, 78 S.Ct. at 969, 2 L.Ed.2d at 1015.

The facts of the instant case reveal that the children involved had been absent from the state of Texas for over ten months when the Texas judgment awarding their custody to the petitioner was rendered.

This denial of full faith and credit to the Texas custody decree is further supported by the "divisible divorce" theory as set out in *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 77 S.Ct. 1360 1 L.Ed.2d 1456 (1957) in which Justice Harlan, in a separate opinion, stated that such a concept as "divisible divorce" was merely an example of the gap existing between due process and full faith and credit. Even though the rendering court had acquired jurisdiction over the parties in accordance with due process requirements, the subject matter of the decree implicated other states' strong local interests in the marital status and welfare of their residents. Whereas the United States Supreme Court perceived a strong need for national uniformity in classifying an individual as single or married, the dissolution of the marriage would be entitled to full faith and credit. But in dealing with the incidents of marital status, such as alimony, however, the Court found that local interests outweighed the need for uniform treatment of the decree; therefore, nonrecognition would not offend the full faith and credit clause. *May, supra* has established that child custody is such a marital incident, like alimony, that local policies may be strong enough to outweigh the demands of full faith and credit.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Martin S. Sanders, Jr.

Martin S. Sanders, III

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A PROFESSIONAL LAW
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Winnfield, Louisiana 71483
(318) 628–6971
COUNSEL FOR PETITIONER

Of Counsel:

Kent McKeever
Fordham University School of Law
140 West 62nd Street
New York, New York 10023

## CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of April, 1982, three (3) copies of the brief in opposition to the petition for writ of certiorari were mailed, postage prepaid to John L. Hammons and Sydney B. Nelson, Nelson, Hammons & Johnson, 705 Milam Street, Shreveport, Louisiana 71101, counsel for petitioner, and I further certify that all parties required to be served have been served.

Martin S. Sanders, Jr.

Martin S. Sanders III

SANDERS & CASTETE, LTD.
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CORPORATION
Post Office Box 190
Winnfield, Louisiana 71483
COUNSEL FOR RESPONDENT

# Petitioner's
# Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 27 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1284

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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JOHONNAS JUSTUS EICKE, Petitioner,
v.
ELIZABETH LARUE EICKE, Respondent.

---

**ON WRIT OF CERTIORARI TO THE**
**COURT OF APPEALS, THIRD CIRCUIT**
**STATE OF LOUISIANA**

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# REPLY BRIEF ON BEHALF OF PETITIONER TO RESPONDENT'S BRIEF AND TO BRIEF AMICI CURIAE FOR THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS ON BEHALF OF THE RESPONDENT

---

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705 Milam Street
Shreveport, Louisiana 71101
318-227-2401
Counsel for Petitioner

---

PETITION FOR CERTIORARI FILED JANUARY 4, 1982
CERTIORARI GRANTED MAY 17, 1982
BRIEF FILED JULY 8, 1982
REPLY BRIEF FILED NOVEMBER 19, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. 81-1284

JOHONNAS JUSTUS EICKE, Petitioner
v.
ELIZABETH LARUE EICKE, Respondent.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA**

# REPLY TO BRIEF OF RESPONDENT

Respondent sets forth at page 4 of her brief that petitioner herein "had deliberately withheld information of the previous Louisiana custody decree" from the Texas court which granted the divorce and custody to the petitioner herein. Petitioner submits that there is no evidence in the record whatsoever to support this assertion and respectfully suggests that this accusation should therefore be totally disregarded.

Additionally, at page 8 of respondent's brief, it is alleged that the children in question had not resided in Texas for a period in excess of three (3) years. Again, respondent seeks to go outside the record to make an accusation which is simply not true. Petitioner again respectfully suggests that this assertion of a "fact" not in evidence should be totally disregarded.

Respondent's reliance upon *Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948) and *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456 (1957), is inapposite in that these cases deal with the issue of alimony, not child custody. Additionally, in both cases the second state was required to give full faith and credit to a valid divorce judgment of a sister state. The "divisible divorce" doctrine was applied simply to allow the second state to enforce its own public policy. In the instant case, there are no allegations that the method of determination by the Texas court of the best interests of the Eicke children violates in any manner whatsoever any public policy of the State of Louisiana. Therefore, the only grounds on which Louisiana may lawfully refuse full faith and credit to the Texas custody decree is upon a finding that Texas did not have jurisdiction over the person of the children or jurisdiction over the subject matter. As will be discussed in more detail later in this reply brief, Louisiana law is conclusive to the effect that the Texas court had both jurisdiction over the subject matter and jurisdiction over the person of the children.

## REPLY TO BRIEF AMICI CURIAE FOR THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

The Amici Curiae brief for the National Conference of Commissioners on Uniform State Laws filed in support of the respondent seeks to introduce into this litigation certain issues which are either concluded by applicable Louisiana law or which fall outside the perameters of the writ application granted by this Court.

The Amici Curiae argue that the 237th District Court of Lubbock County, Texas, did not have jurisdiction in this matter under Texas law because the children were neither domiciled nor physically present in Texas. The Amici Curiae further argue that there was no evidence that the Texas court knew about the Louisiana decree although Texas law required disclosure of any judicial proceeding with continuing jurisdiction in a child custody matter. The Amici Curiae then engages in extensive discourse as to why the Texas court did not have jurisdiction to render the custody decree which forms the basis of this matter. Petitioner respectfully shows that this entire line of argument seeks to introduce into this litigation issues which have not heretofore been raised by the respondent and which are not properly before this Court.

The majority opinion correctly recognized that prior Louisiana jurisprudence clearly established that a judgment of divorce abated a prior judgment of separation in all matters incidental thereto including custody decrees:

> Prior to the adoption by Louisiana of the Uniform Child Custody Jurisdiction Act, our jurisprudence had established the rule that a judgment of divorce, whether rendered in this state or in a foreign state with jurisdiction, abates a prior judgment of separation in this state and all matters incidental thereto including custody decrees. *Fountain v. Fountain,* 365 So. 2d 1139 (La. App. 3rd Cir. 1978); *Webster v. Webster,* 308 So. 2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill,* 304 So. 2d 922 (La. App. 1st Cir. 1974); *Emery v. Emery,* 223 So. 2d 680 (La. App. 4th Cir. 1969).
>
> *Eicke v. Eicke,* 399 So. 2d 1231, 1233 (La. App. 3d Cir. 1981).

The Third Circuit went on further to substantiate that a foreign divorce decree and custody decree incidental thereto was, prior to the judgment in the instant case, entitled to full faith and credit in Louisiana.

> Jurisprudence had also established the rule that a divorce decree and a custody decree incidental thereto rendered in a sister state with jurisdiction is entitled to full faith and credit in Louisiana. *Fountain v. Fountain,* supra; *Webster v. Webster,* supra; *Hill v. Hill,* supra; and *Emery v. Emery,* supra.
>
> *Eicke v. Eicke,* 399 So. 2d 1231, 1233 (La. App. 3d Cir. 1981).

Thus, the holding in the instate case by the Third Circuit, Court of Appeal, State of Louisiana, is in direct contravention to a long line of Louisiana jurisprudence to the contrary. Petitioner has found no case in Louisiana since the rendition of the Third Circuit's opinion which follows the reasoning of the majority in this matter.

Since Louisiana has historically held that a judgment of divorce abates a prior judgment of separation and all matters incidental thereto including custody, then it is inappropriate to characterize the judgment of the Texas court as a "modification" of a prior Louisiana custody decree. In fact, a petition for a separation and a petition for a divorce are two entirely separate and distinct causes of action, neither necessarily resting nor relying upon the other.

Although the Amici Curiae may argue that the refusal by the Louisiana Supreme Court to grant Writs of Certiorari in this case constitutes an affirmation of the reasoning set forth by the majority, such is not the case under Louisiana law. In a footnote in *Coco v. Winston Industries, Inc.,* 341 So. 2d 332 (La. 1976) at page 335, the Louisian Supreme Court specifically stated:

> At the same time, it is worth noting that writ denials by this Court are of no value as precedents.

> *Barham, The Importance of Writ Denial,* 21 Loy. L. Rev. 835 (1975).

Also, in *Garlington v. Kingsley,* 289 So. d 88 (La. 1974) at page 91, the Louisiana Supreme Court explained:

> The refusal of writs by this Court, which is usually based upon incomplete records and ex parte applications and without hearing, is not decisional law. This Court's action upon writs may be indicative of a predisposition on a certain legal issue but is not necessarily determinative of that issue. This Court is not bound by its refusal of writs to adopt a law expressed in Appellate Court opinion, although it may well adopt such a case holding as law when, upon a full hearing, it is found that the holding is supported by positive law or, in the absence of positive law, by reason and logic or natural law.

Thus, it is easily seen that the reasoning of the majority in the Third Circuit does not necessarily constitute a determination by Louisiana's Highest Court that the long line of jurisprudence cited in that opinion has been overturned by the adoption of Louisiana's version of the Uniform Child Custody Jurisdiction Act.

The balance of the argument made by the Amici Curiae with regard to the lack of jurisdiction of the Texas court is also conclusively dealt with under exisiting Louisiana jurisprudence on the subject. Louisiana case law requires that there is a presumption favoring the validity of a foreign judgment and that there exists a heavy burden on the part of the party seeking to prevent its recognition by Louisiana courts to show that the foreign court lacked jurisdiction.

In *Andrews v. Racca,* 399 So. 2d 800 (La. App. 3d Cir. 1981) at page 801, the court held:

> It is now well settled that when a divorce decree cannot be attacked for lack of jurisdiction in the rendering state, it may not be collaterally attacked in any other state. In such cases, full faith and credit must be extended to the decree. U.S. Constitution, Article IV, Section 1; *Johnson v. Muelberger* 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (1951); *Brown v. Brown,* 387 So. 2d 565 (La. 1980); *Boudreaux v. Welch,* 249 LA 983, 192 So. 2d 356 (1966); *Glaze v. Glaze,* 389 So. 2d 798 (La. App. 3d Cir. 1980).
>
> The burden of proving that a divorce decree may be collaterally attacked rests with the person seeking to deny it full faith and credit. *Sandifer v. Sandifer,* 389 So. 2d 767 (La. App. 3d Cir. 1980); *Didier v. Didier,* 230 So. 2d 436 (La. App. 1st Cir 1979), Writ Denied 255 LA 806, 233 So. 2d 248 (1970).

In *Holden v. Holden,* 374 So. 2d 749 (La. App. 3d Cir. 1979), at page 751, the court held:

> Although the jurisdiction of a court rendering a judgment is open to judicial inquiry when enforcement of that judgment is sought within this State, there is a general presumption that the decree is valid and the burden of undermining such a judgment rests heavily upon the assailant. *Navarrette v. Laughlin,* 209 LA 417, 24 So. 2d 672 (1946); *Berry v. Berry,* 307 So. 2d 821 (La. App. 3d Cir. 1975. The burden to establish that the court of the rendering state was without jurisdiction can only be discharged by clear and positive proof. *Turpin v. Turpin,* 175 So. 2d 357 (La. App. 2d Cir. 1965).

The burden of proof which rests upon the respondent in this case to prove that Texas was without jurisdiction to enter its decree is summarized in *Turpin v. Turpin,* 175 So. 2d 357 (La. App. 2d Cir. 1965) at page 359 as follows:

> The only question which the courts of this State can consider with respect to a decree of the courts of another state is a jurisdictional requirement of domicile. *Williams v. North Carolina,* supra; *Voorhies v. Voorhies,* 184 LA 406, 166 So. 2d 121 (1936); *State v. Wenzel,* 185 LA 808, 171 So. 2 38 (1936); *State v. Dickinson,* 191 LA 266, 185 So. 2d 20 (1938); *Juneau v. Juneau,* supra.
>
> *Where it has been conclusively shown by sufficient proof that the court rendering the decree did not have the jurisdictional requirement of domicile,* the courts of this State will not give faith and credit to divorce decrees rendered by courts of other states. *Williams v. North Carolina,* supra; *Juneau v. Juneau,* supre; *Navarrette v. Laughlin,* supra; *State v. Dickinson,* supra; *State v. Wenzel,* supra; *Voorhies v. Voorhies,* supra.
>
> The burden of determining the invalidy of a foreign decree rests heavily upon those who assail it; the burden to establish that the court of the other State was without jurisdiction requires clear and positive proof.

Subsequent Louisiana cases have likewise placed a heavy burden upon those seeking to invalidate a judgment of a foreign jurisdiction:

> The burden of proving that the original judgment of divorce may be collaterally attacked rests, of course, with the person seeking to deny it full faith and credit. *Didier v. Diedier,* 230 So. 2d 436, Writ

> Refused 233 So. 2d 248 (La. App. 1st Cir. 1970).
>
> The only question which the courts of this State can consider with respect to a decree of the courts of another State is a jurisdictional requirement of domicile. Louisiana Courts will give full faith and credit to divorce decrees rendered by courts of other states except where it has been conclusively shown by sufficient proof that the court rendering the decree did not have the jurisdictional requirement of domicile. The burden of undermining the decree of the other state rests heavily upon the assailant. *Hampson . v Hampson,* 271 So. 2d 898, 904 (La. App. 2d Cir. 1972).
>
> The burden of undermining the decree of the other state rests heavily upon the assailant, 307 So. 2d 821, 823 (La. App. 3d Cir. 1975).

The record of these proceedings is totally devoid of any evidence whatsoever establishing that the Texas court did not have jurisdiction to render both the divorce degee and the custody decree. In fact, the *only* evidence relating to the jurisdictional requirements of Texas are to be found in the Texas judgment itself wherein the court specifically finds that it has jurisdiction to render its judgment. The Louisiana case law cited hereinabove specifically places the burden upon respondent to prove with clear and convincing evidence that the Texas court was without jurisdiction; hovever, respondent has completely failed to do so, and the Amici Curiae now seeks to introduce an entirely extrinsic issue into this litigation.

In *Broaday v. Broaday,* 360 So. 2d 645 (La. App. 3d Cir. 1978) at page 648, the court sets forth the specific pleading requirements for raising the invalidity of a foreign judgment based upon a lack of jurisdiction:

> Lack of jurisdiction of the California Court to render the judgment against defendant is a defense to the merits of this suit filed by the plaintiff under LSA-CCP Article 2541 to have the California judgment recognized and made the judgment of the Louisiana Court. Such a defense should be raised by answer to plaintiff's petition and should be tried on the merits.

A review of the pleadings filed in the District Court clearly establishes that respondent failed to raise this issue and furthermore proves conclusively that no evidence was introduced to challenge the jurisdiction of the Texas courts. In fact, the Court of Appeal, Third Circuit, State of Louisiana, specifically found that the Texas court did have jurisdiction over the parties and the subject matter of this litigation.

The Amici Curiae further argues at page 20 that this Court should except Louisiana from the requirement of full faith and credit since concern for the children is an elemental part of Louisiana policy. Obviously, this position could result in catastrophic results in domestic litigation by allowing Louisiana to refuse to give full faith and credit to *any* Texas custody decree, presumably because Texas has not enacted the Uniform Child Custody Jurisdiction Act, which would encourage precisely those evils which the Uniform Act purportedly seeks to avoid. Rather, to require states to give full faith and credit to foreign decrees adds stability to reasoned custody decrees in that relitigation is discouraged, custody determinations by physical abduction are deterred, and jurisdictional competition is avoided. Allowing modification of foreign decrees upon a showing of "changed circumstances" provides adequate safeguards to ensure the general welfare of the child.

The Amici Curiae further seeks to require the application of full faith and credit for the first decree (the Louisiana decree) rather than for the second decree (the Texas decree), arguing that to grant the Texas decree full faith and credit would be "to legitimize the last bite" in a type of litigation where there may never be a "last bite". This argument completely ignores the notification given respondent of the Texas proceedings thus allowing her ample opportunity to appear in the Texas proceedings and present whatever evidence she deemed appropriate to prove her claims to custody. Furthermore, respondent had the right and the opportunity to challenge the jurisdiction of the Texas proceedings both in Texas and again in Louisiana but chose not to do so. In fact, respondent's failure to appear in the Texas proceedings to seek recognition of her prior Louisiana custody decree raises the presumption of "changed circumstances" thus supporting the authority of the Texas court to render a "modification" decree even under the reasoning of the Amicus Curiae. Additionally, the last-in-time rule is a constitutional principle which is well recognized in all areas of the law. To disregard the concept of last-in-time would be to introduce into the law a very dangerous principle which would most certainly cause considerable uncertainty and instability in all forms of litigation.

In short, Louisiana has rejected totally and completely the concept of full faith and credit as applying to custody decrees. The Louisiana Court found neither jurisdictional irregularities with the Texas decree nor a change in circumstances but nevertheless refused to recognize the Texas judgment. This Louisiana concept is extremely dangerous in that it promotes an utter disregard for constitution principles, detracts from comity between the states, and enhances the probability of forum shopping and abduction in custody cases.

Petitioner respectfully urges this Court to reject the arguments of both respondent and the Amici Curaie and to enter judgment accordingly in favor of petitioner reversing the majority opinion of the Court of Appeal, Third Circuit, State of Louisiana.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Reply Brief for the Petitioner were mailed, postage prepaid, to Martin S. Sanders, Jr. and Martin S. Sanders, III, P.O. Box 190, Winnfield, Louisiana 71483, counsel for respondent, and three (3) copies were mailed to M. King Hill, Jr., President, National Conference of Commissioners on Uniform State Laws, 6th Floor, 100 Light Street, Baltimore, Maryland 21202, and John M. McCabe. Legal Counsel, National Conference of Commissions on Uniform State Laws, Suite 510, 645 North Michigan, Chicago, Illinois 60611, *Amici Curiae on Behalf of Respondent.*

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# Petitioner’s Brief

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CLERK

NO. 81-1284

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JOHONNAS JUSTUS EICKE, Petitioner,
v.
ELIZABETH LARUE EICKE, Respondent.

**ON WRIT OF CERTIORARI TO THE**
**COURT OF APPEALS, THIRD CIRCUIT**
**STATE OF LOUISIANA**

# BRIEF FOR THE PETITIONER

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PETITION FOR CERTIORARI FILED JANUARY 4, 1982
CERTIORARI GRANTED MAY 17, 1982
BRIEF FILED JULY 8, 1982

# QUESTION PRESENTED

Whether Louisiana may refuse to give full faith and credit under the provisions of Article IV, Section 1 of the United States Constitution to a final judgment of divorce and custody rendered in Texas where Texas had jurisdiction over the parties and jurisdiction over the subject matter.

## INDEX

Opinion below .......... 7

Jurisdiction .......... 8

Question presented .......... 8

Statutory provisions involved .......... 8

Statement of the case .......... 9

Argument .......... 11

The decision below is in conflict with the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution and has resulted in two conflicting final judgments in different states regarding which parent has custody of the two minor children .......... 11

Conclusion .......... 29

Certificate of Service .......... 31

## CITATIONS

### CASES:

Kovacs v. Brewer, 356 US 604,
78 S. Ct. 963, 2 L.Ed. 2d 1008 (1958) ..... 23

May v. Anderson, 345 US 528,
73 S.Ct. 840, 97 L.Ed. 1221 (1952) ......... 22

New York Ex Rel. Halvey v. Halvey,
330 US 610, 67 S.Ct. 903,
91 L.Ed. 1133 (1947) ...................... 22

Vanderbilt v. Vanderbilt, 354 US 416,
77 S.Ct. 1360, 1 L.Ed. 2d 1456 (1957) ...... 23

Webb v. Webb, 101 S.Ct. 1899 (1981) ........ 15

Williams v. State of North Carolina,
317 U.S. 287, 63 S.Ct. 207 (1942) .......... 19

Williams v. State of North Carolina,
325 U.S. 226, 65 S. Ct. 1092 (1945) ........ 21

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OCTOBER TERM, 1982

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JOHONNAS JUSTUS EICKE, Petitioner

v.

ELIZABETH LARUE EICKE, Respondent.

## ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA

# BRIEF FOR THE PETITIONER

The petitioner Johonnas Justus Eicke respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Third Circuit, State of Louisiana entered in this proceeding on May 27, 1981, writs of certiorari being denied by the Louisiana Supreme Court on October 9, 1981.

## OPINION BELOW

The denial by the Supreme Court of the State of Louisiana of petitioner's application for a writ of review is attached hereto as well as a copy of the opinion of the Court of Appeal, Third Circuit, State of Louisiana, rendered by split decision on May 27, 1981. A copy of the opinion of the Twenty-eighth Judicial District Court, Parish of LaSalle, State of Louisiana, rendered on September 2, 1980, is also attached hereto.

## JURISDICTION

The judgment of the Supreme Court of the State of Louisiana denying petitioner's application for writ of review to the Court of Appeal, Third Circuit, State of Louisiana, was rendered on October 9, 1981, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

## QUESTION PRESENTED

Whether Louisiana may refuse to give full faith and credit under the provisions of Article IV, Section 1 of the United States Constitution to a final judgment of divorce and custody rendered in Texas where Texas had jurisdiction over the parties and jurisdiction over the subject matter.

## STATUTORY PROVISIONS INVOLVED

### United States Constitution, Article IV, Section 1

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

### United States Code, Title 28, Section 1738

Such acts, records and judicial proceedings and copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken.

### Louisiana Code of Civil Procedure, Article 2541

A party seeking recognition or execution by a Louisiana Court of a judgment or a decree of a Court of the United States or Territory thereof, or of any other State, or of any foreign country, must bring an ordinary proceeding against the judgment debtor in the proper Louisiana Court, to have the judgment or decree recognized and made the judgment of the Louisiana Court.

## STATEMENT OF THE CASE

Petitioner and respondent were married on January 3, 1974, in Ketchikan, Alaska, and later moved to Texas where two children were conceived and born, namely, Sunnydale J. Eicke, born March 23, 1976, and Christopher Allan Eicke, born July 22, 1978. In late 1978, petitioner, respondent and their two children moved to Louisiana for a short time but returned to Texas in April, 1979, where they resided until August 9, 1979, at which time respondent abandoned petitioner in Texas and established a separate domicile in LaSalle Parish, Louisiana, with the two children.

On October 26, 1979, respondent filed suit in the Twenty-eighth Judicial District Court in and for LaSalle Parish, Louisiana, against petitioner seeking a judgment of separation from bed and board from petitioner and further seeking legal custody of the minor children. An attorney was appointed, subject to the provisions of Article 5091 of the Louisiana Code of Civil Procedure, to represent the nonresident defendant, petitioner herein, who had remained at the former matrimonial domicile in Texas. On December 14, 1979, judgment was rendered in the Twenty-eighth Judicial District Court granting unto respondent a judgment of separation from bed and board from petitioner herein and further awarding to her the legal care, custody and control of the minor children born of the marriage. Petitioner did not personally appear in these proceedings.

On April 16, 1980, petitioner filed a suit in the 237th

District Court in and for Lubbock County, Texas, seeking a judgment of absolute divorce from respondent herein and further seeking the legal care, custody and control of the minor children born of the marriage. Respondent was served with notice of the Texas proceedings but made no personal appearance therein. On June 18, 1980, petitioner obtained a judgment of final divorce from respondent herein and was granted the legal care, custody and control of the minor children born of the marriage.

On July 17, 1980, following the appropriate appeal delays in Texas, petitioner filed his present suit in the Twenty-eight Judicial District Court, LaSalle Parish, Louisiana, seeking recognition of the Texas divorce and custody decrees under the provisions of Article 2541 of the Louisiana Code of Civil Procedure. Respondent answered alleging that petitioner's Texas divorce and custody decree were invalid for lack of jurisdiction in the Texas Court. The trial on the merits was had on August 29, 1980, and judgment rendered by the District Court by written opinion on September 2, 1980, and read and signed on September 5, 1980, giving full faith and credit to, and making executory, all provisions of the Texas divorce decree except those relating to custody of the minor children.

Petitioner appealed the decision of the Twenty-eighth Judicial District Court in which the District Court had refused to give full faith and credit to the Texas custody decree to the Court of Appeal, Third Circuit, State of Louisiana, which rendered a split decision on May 27, 1981, in which the majority opinion sustained the action of the trial court holding that the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act, LSA-R.S. 13:1700 et seq, had altered prior Louisiana jurisprudence so as to allow the District Court to refuse to give full faith and credit under Article IV, Section 1 of the United States

Constitution to the final judgment of the Texas Court granting custody of the minor children to the petitioner herein.

Petitioner timely filed his motion for rehearing on June 24, 1981; however, rehearing was denied on July 8, 1981, with Judge LaBorde dissenting.

Petitioner then timely filed his application for a writ of review on August 10, 1981; however, the application was denied by the Supreme Court of the State of Louisiana on October 9, 1981.

## ARGUMENT

### The decision below is in conflict with the full faith and credit clause of Article IV, Section 1 of the United States Constitution and has resulted in two conflicting final judgments in different states regarding which parent has custody of the two minor children.

By denying petitioner's application for a writ of review to the Third Circuit, Court of Appeal, State of Louisiana, the Louisiana Supreme Court has effectively affirmed the majority opinion which reasoned that the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act gives unto Louisiana the right to refuse to give full faith and credit to a custody decree rendered in a sister State if such a decree was not rendered in strict accordance with the procedural framework set forth in Louisiana's version of the Uniform Child Custody Jurisdiction Act. The majority opinion couches the legal issue presented by the facts of this case as follows:

> The precise issue presented is whether, under the Uniform Act, Louisiana is required to recognize an out-of-state custody decree rendered in a divorce proceedings, where the foreign custody decree is in conflict with a custody decree rendered in previous separation proceedings in Louisiana [Page 4 of majority opinion of Third Circuit.]

The dissenting opinion sets forth an entirely different view of the legal issue presented to the Court of Appeal, Third Circuit:

> I disagree that this is a child custody case involving application of the Uniform Child Custody Jurisdiction Act. It is instead a pure full faith and credit case posing the issue of whether Louisiana must recognize and give effect to the custody portion of a Texas judgment of divorce. Under Article 4, Section 1 of our United States Constitution, I am convinced that we must. [Page 1 of dissenting opinion.]

The majority opinion seeks to review these facts solely in the context of the procedural framework outlined by Louisiana's version of the Uniform Child Custody Jurisdiction Act without any regard whatsoever to the appropriate application of the Full Faith and Credit Clause of the United States Constitution. The majority sets forth the following statement of well-entrenched Louisiana jurisprudence and the effect thereon by the enactment of the Uniform Act:

> Prior to the adoption by Louisiana of the Louisiana Child Custody Jurisdiction Act, our jurisprudence had established the rule that a judgment of divorce, whether rendered in this State or in a foreign State with jurisdiction, abates a prior judgment of separation in this State and all matters incidental thereto including custody decrees. *Fountain v. Fountain*, 365 So.2d 1139 (La. App. 3rd Cir. 1978); *Webster v. Webster*, 308 So.2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill*, 304 So.2d 922 (La. App. 1st Cir. 1974); *Emery v. Emery*, 223 So.2d 680 (La. App. 4th Cir. 1969). Jurisprudence had also established the rule that a divorce decree and

> a custody decree incidental thereto rendered in a sister State with jurisdiction is entitled to full faith and credit in Louisiana. ***Fountain v. Fountain***, supra; ***Webster v. Webster***, supra; ***Hill v. Hill***, supra; and ***Emery v. Emery***, supra.
>
> If these jurisprudential rules are still controlling, the District Court in the present case erred in not recognizing the Texas custody decree, since the record clearly shows the Texas Court had jurisdiction of the custody of the children under the Texas law. Counsel for the father cited in his brief provisions of the Texas Family Code Annotated, Sec. 11.051, which states that Texas has jurisdiction of custody disputes where the child was conceived in Texas or the person on whom service is required has resided in Texas with the child. Also cited is ***Butler v. Butler***, 577 SW2d 501 (Ct. of Civ. App. of Tex. 1978) which holds that where Texas was the last matrimonial domicile between the parents and the suit was commenced within two years after co-habitation in Texas ended, the minimum contacts necessary for Texas jurisdiction under its long-arm statutes are satisfied. Thus, Texas had jurisdiction under its laws. Likewise, there is no question that the Louisiana Court had jurisdiction under its laws to render the judgment of separation and custody decree in 1979. The mother was then domiciled in Louisiana and the children lived with her. (emphasis added) [Pages 2 and 3 of majority opinion.]

The majority opinion then goes into considerable detail to explain the motives for the enactment of the Uniform Child

Custody Jurisdiction Act by the Louisiana Legislature and the requirements in the act which are placed upon the State in cases of concurrent custody jurisdiction. The majority specifically finds that the Texas District Court failed to follow the prescribed procedural mechanism outlined in the Uniform Act. However, it must be noted that the Texas legislature had not enacted the Uniform Child Custody Jurisdiction Act, and, therefore, the Texas District Court was not required under Texas law to apply the provisions of the Uniform Child Custody Jurisdiction Act.

The Louisiana courts have ignored the Full Faith and Credit Clause of the United States Constitution in their opinions rendered in this matter. Article IV, Section 1 of the United States Constitution provides:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

This clause is implemented by 28 USC 1738 which sets out the manner for authenticating the documents for use in other States as follows:

> Such acts, records and judicial proceedings and copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken.

Article 2541 of the Louisiana Code of Civil Procedure sets forth the manner in which foreign judgments are made executory in the State of Louisiana as follows:

> A party seeking recognition or execution by a

> Louisiana Court of a judgment or a decree of a Court of the United States or Territory thereof, or of any other State, or of any foreign country, must bring an ordinary proceeding against the judgment debtor in the proper Louisiana Court, to have the judgment or decree recognized and made the judgment of the Louisiana Court.
>
> A duly authenticated copy of the judgment or decree must be annexed to the petition.

Petitioner herein filed his original petition to make foreign judgment executory in strict accordance with both State and Federal law and is therefore entitled to have the Texas custody decree recognized and made executory in the State of Louisiana under the Full Faith and Credit Clause of the United States Constitution.

In the recent United States Supreme Court of *Webb v. Webb*, 101 S.Ct. 1889 (1981), the Supreme Court was faced with an almost identical factual situation, and writs of certiorari were initially granted but later denied when it was determined that the petitioner had failed properly to raise or preserve her claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia Courts.

Justice White, delivering the opinion of the court, summarized the reason why this dispute had reached the United States Supreme Court as follows:

> This case involves a custody dispute between the mother and father of a minor child. Their dispute has reached this Court because the State Courts of Florida and Georgia have reached conflicting results in assigning custody of the child. (101 S.Ct. 1889, 1890)

The instant case involves the identical situation: Texas has granted custody of the two minor children to the father, and Louisiana has granted custody of the two minor children to the mother.

With regard to the issue of the propriety of the petitioner's full faith and credit claim, the Court held in ***Webb***:

> Because this case comes to this Court from a State Court, the relevant jurisdictional statute is Title 28 U.S.C. 1257. As applied to the circumstances of this case, that statute requires that in the State Courts petitioner have "specially set up or claimed under the constitution (of) the United States" that right which he now seeks to have this Court enforce. 28 U.S.C. 1257 (3). Similarly, our Rule 21.1 (H) requires the petitioner to "specify the stage in the proceedings, both in the Court of the first instance and in the Appellate Court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court." Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia Courts.
>
> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that Court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts unless the aggrieved party in this Court can affirmatively show the contrary." (101 S.Ct. 1889, 1891)

Petitioner herein shows that his original petition filed in the Twenty-eighth Judicial District Court, LaSalle Parish, State of Louisiana, specifically requested that the Texas divorce decree be recognized and made executory under the provisions of Article 2541 of the Louisiana Code of Civil Procedure. Petitioner further shows that the District Court found that Louisiana had exclusive jurisdiction of the issue of custody of the minor children:

> I find, notwithstanding the rendition of a judgment of divorce between these litigants subsequent to the rendition of a judgment of separation in this Court, that this Court had and still has exclusive jurisdiction over the custody of Sunnydale Eicke and Christopher Eicke and that therefore, the 237th District Court of Texas did not possess jurisdiction over their custody on the 18th day of June, 1980. Therefore, while the divorce itself is entitled to recognition, the custody decree portions of the judgment are not entitled to recognition under Article 4, Section 1 of the Constitution of the United States or under Article 2541 of the Louisiana Code of Civil Procedure. [Pages 2 and 3 of the opinion of the Twenty-eighth Judicial District Court.]

Petitioner then appealed the decision of the Twenty-eighth Judicial District Court to the Court of Appeal, Third Circuit, State of Louisiana, specifically enumerating as one of the questions presented the following:

> Does the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act override the provisions of the full faith and credit clause of the United States Constitution?

As cited hereinabove, the majority opinion, on appeal, ignores the Full Faith and Credit Clause issue and holds instead that the failure of the Texas Court to apply the Uniform Child Custody Jurisdiction Act renders that judgment unenforceable in the State of Louisiana. However, the dissenting opinion emphatically challenges the majority's reasoning:

> I disagree that this is a child custody case involving application of the Uniform Child Custody Jurisdiction act. It is instead a pure full faith and credit case posing the issue of whether Louisiana must recognize and give effect to the custody portion of a Texas judgment of divorce. Under Art. 4, Sec. 1 of our United States Constitution, I am convinced that we must. [Page 1 of dissenting opinion.]

Petitioner applied for a writ of review to the Court of Appeal, Third Circuit listing the following specification of error:

> In holding that the adoption by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act, LSA-R.S. 13:1700 et seq, rescinded prior jurisprudence holding that a judgment of divorce and custody decree incidental thereto rendered in a sister State with jurisdiction was entitled to be given full faith and credit under the provisions of Article 4, Sec. 1 of the United States Constitution.

The Louisiana Supreme Court denied the application for writ of review on October 9, 1981, stating simply: "Denied. The result is correct."

Clearly then, petitioner has properly preserved his claim under the Full Faith and Credit Clause of the United States Constitution. The question then becomes whether this case presents either a factual or a legal situation which should be resolved by the United States Supreme Court. Petitioner urges that both requisites are more than adequately met as will be outlined herein below.

The most immediate problem is the conflicting custody decrees rendered by the Texas and the Louisiana Courts: Texas granting custody to the petitioner and Louisiana granting custody to the respondent. In the present context, the legal custody of the two minor children is dependent upon their location. If they are in Texas, petitioner is their legal guardian, and if they are in Louisiana, respondent is their legal guardian. As set forth in *Williams v. State of North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 213 (1942):

> The marriage relation creates problems of large social importance. Protection of offspring, property interest and the enforcement of martial responsibilities are but a few of commanding problems in the field of domestic relations with which the State must deal.
>
> ---
>
> This Court stated in *Atherton v. Atherton*, supra, 181 U.S. at P. 162, 21 S.Ct. at P. 547, 45 L.Ed. 794 that "a husband without a wife, or a wife without a husband, is unknown to the law." But if one is lawfully divorced and remarried in Nevada and still married to the first spouse in North Carolina, an even more complicated and serious condition would be realized. We would then have what the Supreme Court of Illinois declared to be the "most perplexing and distressing complication in the domestic relations of many citizens in the different States." [317 U.S. 299, 63 S.Ct. 214]

As the Supreme Court so wisely enunciated above, a nation cannot have conflicting judgments as to the validity of a divorce. The instant case presents an equally perplexing and frustrating problem with regard to custody of children of divorced parents. Conflicting custody decrees would in-variably lead to significant emotional and psychological harm on the children and might be expected to lead to kidnapping and possible violence particularly under the circumstances of this case where legal custody would rest solely with the location of the children. In other words, the very fact of the conflicting decrees will enhance the probability that the parent without actual custody might attempt to "kidnap" the children and take them to the appropriate forum where his legal custody would be recognized. Should that occur, obviously the other party would then be encouraged to attempt the same sort of maneuver in hopes of returning the children to the forum where his custody would be recognized. Such a dangerous state of affairs simply cannot be tolerated.

Reviewing this case from the larger viewpoint, i.e., its possible impact upon interstate custody disputes, it becomes readily apparent that if Louisiana's approach, as outlined by the majority opinion of the Court of Appeal, Third Circuit, were allowed to stand, multiple conflicting custody decrees could be expected from various States. Louisiana has enacted the Uniform Child Custody Jurisdiction Act and Texas has not. Louisiana has made a requirement upon Texas Courts that those Texas Courts handle custody matters pursuant to the provisions of the Uniform Child Custody Jurisdiction Act in order for the Texas custody decrees to be given full faith and credit in Louisiana. Obviously such a requirement smacks of unconstitutionality and would reek utter havoc in domestic relations across the country. Texas is by no means the only State which has failed to adopt the Uniform Child Custody Jurisdiction Act. It is fair to assume that Louisiana would apply this same reasoning to custody decrees rendered in other States so as to have a means of refusing to give foreign custody decrees full faith and credit and thereby relitigate the merits of the prior foreign judgment. Just as obviously, if Louisiana is allowed to hide behind the Uniform Child Custody Jurisdiction Act so as to ignore the Full Faith and Credit Clause of the United States Constitution, then any other State could do likewise thus creating an utterly untenable situation with regard to custody of minor children throughout this nation.

In *Williams v. State of North Carolina*, 65 S.Ct. 1092, 1094, 325 U.S. 226, 229 (1945) the United States Supreme Court set forth the rule which is applicable hereto:

> But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia convention. 2 Farrand, the Records of the Federal Convention of 1787, 447, 485. "To give it the force of a judgment in another State, it must be made a judgment thereto." *McElmoyle v. Cohen*, 13 Pet. 312, 325, 10 L.Ed. 177. It can be made a judgment there only if the Court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the Court of the first State had power to pass on the merits — had jurisdiction, that is, to render the judgment.

Regarding the question of jurisdiction, the Court went on to state:

> The State of domiciliary origin should not be bound by an unfounded, if not collusive, recital in the record of a Court of another State. As to the truth or existence of a fact, like that of domicile, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own

> unquestioned authority, to ascertain the truth or existence of that crucial fact. (65 S.Ct. 1092, 1095, 325 U.S. 226, 230)

Respondent relies upon four United States Supreme Court cases for her proposition that Louisiana need not give full faith and credit to the Texas custody decree, namely, *New York Ex Rel. Halvey v. Halvey,* 330 US 610, 67 S.Ct. 903, 91 L.Ed. 1133 (1947), *May v. Anderson,* 345 US 528, 73 S.Ct. 840, 97 L.Ed. 1221 (1952), *Kovacs v. Brewer,* 356 US 604, 78 S.Ct. 963, 2 L.Ed.2d 1008 (1958), and *Vanderbilt v. Vanderbilt,* 354 US 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456 (1957). However, these cases may be easily distinguished from the instant case in that they include language which is most supportive of petitioner's position and have specifically reserved that constitutional issue.

In *New York Ex Rel. Halvey v. Halvey, supra,* the Supreme Court noted that its findings were limited to the very narrow ground that the petitioner had failed to prove that the Florida decree received less credit in New York than it had in Florida. It specifically reserved the question of whether a state with jurisdiction over a child may make such orders concerning his custody as the general welfare of the child requires regardless of a custody decree rendered in another state. (330 US 610, 615-616) However, the Court did note that the general rule regarding the full faith and credit clause requires the judgment of a sister state to be given full, and not partial, credit in the forum state. (330 US 610, 614) In short, the United States Supreme Court specifically reserved the question which is before it in the instant case.

In *May v. Anderson, supra,* the majority opinion is again inapposite to the case at hand in that the facts arise from a habeas corpus proceeding filed in Ohio in which the Supreme Court of the State of Ohio held that the full faith and credit clause of the United States Constitution precluded Ohio from determining the best interests of the children and further precluded Ohio from making a determination of whether there had occurred a change in circumstances since the original Wisconsin decree was rendered.

The instant case is before this Honorable Court pursuant to specific Louisiana statutory authority for the enforcement of a foreign judgment (Article 2541 of the Louisiana Code of Civil Procedure). This particular procedure, as noted by the majority opinion of the Third Circuit, State of Louisiana, does not provide a means for relitigating the merits of any matter, including custody matters, but only allows the trial court to determine whether the state rendering the judgment sought to be enforced had jurisdiction over the parties and jurisdiction over the subject matter. The majority opinion clearly concedes that Texas did indeed have jurisdiction both over the person of each of the parties and the children and over the subject matter. Thus, Louisiana must give full faith and credit to the valid Texas custody decree.

In *Kovacs v. Brewer, supra,* the Court noted that the petitioner raised important constitutional questions regarding the application of the full faith and credit clause to custody decrees. However, the Court went on to note that such questions should be postponed as long as a reasonable alternative exists. (356 US 604, 607) The Court then noted that the pleadings in the forum state raised numerous questions of "changed circumstances" and that considerable evidence was introduced on that issue and a number of findings were made by the lower courts indicating that the facts had changed since the initial decree sought to be modified. The Court, as it had done in *New York Ex Rel. Halvey v. Halvey, supra,* reserved the constitutional issue (356 US 604, 607).

The holding in *Vanderbilt v. Vanderbilt, supra,* is also readily distinguishable in that the Supreme Court specifically found that the forum state did not have personal jurisdiction over the petitioner and therefore any judgment of divorce rendered in favor of the respondent (over whom the forum state did have personal jurisdiction) could not adversely affect the petitioner's personal rights to support. (354 US 416, 418-419) In the instant case, the Third Circuit, State of Louisiana concedes that the Texas decree was rendered with jurisdiction both over the subject matter and over the person of both petitioner, respondent and their two children.

What is clear from the case law cited by respondent is that custody decrees are not "final" in the sense that money judgments or other such decrees may be "final." Justice Frankfurter in his dissent in *Kovacs v. Brewer, supra,* notes:

> It was the purpose of the Full Faith and Credit Clause to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in another. The clause was thus designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation. But when courts are confronted with the responsibility of determining the proper custody of children, a more important consideration asserts itself to which regard for curbing litigious strife is subordinated — namely, the welfare of the child. (356 US 604, 612)

The concern which Justice Frankfurter has voiced in the above referenced language has been silenced by the recognition of the Courts of this Nation that all custody decrees are always subject to modification if there is a "change in circumstances" which requires modification of the decree for the general welfare of the child.

That principle — allowing the forum state to modify a decree of another state with regard to custody if it is in the best interests of the minor child — is *not* an issue in this suit. Respondent has filed no pleadings nor introduced any evidence whatsoever, and there has been no findings by any of the lower courts, that there exists a change of circumstances sufficient to modify the Texas custody decree so as to change custody from petitioner to respondent. Although respondent has had ample opportunity to file the necessary pleadings and to introduce whatever evidence she may have to support those allegations, the record clearly establishes that she has not done so. Thus, the sole issue before this Court is not whether Louisiana has a right to modify the valid Texas custody decree but whether Louisiana may simply ignore that decree and refuse to give it full faith and credit under the United States Constitution.

> Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not cognizable in the State where the judgment was rendered (see *F. Williams v. North Carolina,* 325 US 226, 230, 89 L.Ed. 1577, 1581, 65 S.Ct. 1092, 157 ALR 1366), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it or to depart from it, as does the State where it was rendered. (*New York Ex Rel. Halvey v. Halvey,* 330 US 610, 615)

Thus, for Louisiana to refuse to enforce the Texas custody decree, Louisiana must show that the Texas decree was not enforceable in Texas. There is no such proof in the record, and it is clearly the general law of this Nation that a custody decree, once rendered, remains effective until there is a subsequent showing, by preponderance of the evidence, that it is in the best interests of the child that the custody decree be modified or abrogated. The majority opinion recognized the validity of the Texas decree and made *no* findings showing a change in circumstances sufficient to warrant modification of the Texas decree.

To allow Louisiana to refuse to give full faith and credit to this Texas custody decree without any evidence to support a "change in circumstances," or to show that this decree is not in the best interests of the children would needlessly thwart the policy behind the full faith and credit clause: that there be certainty and finality and an end to harassing litigation. To hold otherwise would allow a dissatisfied litigant to forum shop from one state to another hoping to eventually obtain a satisfactory decree. Such a position could materially disrupt the lives of the children that the law seeks to protect. Unless there is a showing in the record of a change in circumstances sufficient to alter the Texas custody decree, there is simply no valid reason why Louisiana should be allowed to refuse to give the Texas custody decree full faith and credit. Since the record clearly discloses that respondent has filed no pleadings nor introduced any evidence whatsoever to establish the necessary "change in circumstances," it can only be assumed that the circumstances at the time of the hearing on the rule to make foreign judgment executory in the 28th Judicial District Court, LaSalle Parish, Louisiana, were identical to those present at the time of the rendition of the Texas custody decree. Therefore, to allow Louisiana to refuse to give full faith and credit to the Texas decree under these circumstances thwarts the policy of comity between the states, the underlying policy behind the full faith and credit clause, and equity and justice for the party litigants.

Although petitioner recognizes that Louisiana, like all other states, has a special obligation to protect children, which interest should be balanced against the full faith and credit obligation to recognize foreign custody decisions embodying another state's legal standards, there is no ligitimate state interest in relitigating purely factual issues which have been decided through fair procedures by a court properly exercising jurisdiction over the parties and over the subject matter. In this sense, the underlying policy of the full faith and credit clause — to unify nationally the judicial system — mandates that the forum state, e.g., Louisiana, give full faith and credit to the rendering state's custody decree. These concepts are particularly true under the procedural framework of the instant case whereby the Louisiana court was not even presented with pleadings seeking a modification of the Texas custody decree. Louisiana has acknowledged the jurisdiction of Texas over the parties and the subject matter and has relied solely upon its own adoption of the Uniform Child Custody Jurisdiction Act as grounds to refuse full faith and credit to the Texas decree. Louisiana may not nullify provisions of the United States Constitution by enactment of local legislation.

Relying upon *Revere v. Revere,* 389 So.2d 1277 (La. 1980), the majority opinion of the Third Circuit holds that that the enactment by the Louisiana Legislature of the Uniform Child Custody Jurisdiction Act sets forth the procedural guidelines on which full faith and credit will be based. Louisiana would, therefore, refuse to give full faith and credit to a custody decree rendered by any state which utilized a procedural framework which was not substantially similar to Louisiana's version of the Uniform Child Custody Jurisdiction Act.

The Louisiana Supreme Court noted in *Revere v. Revere,* 389 So. 2d 1277 (La. 1980), at footnote three:

> Texas has not enacted the uniform law. The act, however, is not a reciprocal act, and by adopting the uniform law, Louisiana has obligated itself to adhere to the terms of the act even though the other concerned state has not done so.

Since the act is not a reciprocal act, and Texas is one of the states which has chosen not to enact it, Texas is not bound by the provisions of the act whereas Louisiana is. Therefore, for Louisiana to amend a valid Texas custody decree, Louisiana must adhere to the procedural guidelines set forth in the act. Texas is not bound by the provisions of the act; thus, to hold as did the majority, that the Texas custody decree is not entitled to full faith and credit in Louisiana because the Texas court failed to apply the provisions of the Uniform Child Custody Jurisdiction Act, provokes a most incongruous situation, i.e., a Texas court would be required to apply a law which the Texas legislature has not chosen to enact. This situation offends the constitutional principle that a state may not nullify provisions of the United States Constitution by the enactment of local legislation.

## CONCLUSION

Petitioner has been granted custody of his minor children by virtue of a valid Texas decree. Utilizing Article 2541 of the Louisiana Code of Civil Procedure, petitioner sought to have the Texas decree recognized in the State of Louisiana. Respondent has not sought to urge that there presently exists a change in circumstances sufficient to warrant a modification of the prior Texas custody decree but has only alleged that Texas did not have jurisdiction to render its original custody order.

The Court of Appeal, Third Circuit, State of Louisiana, has recognized and admitted that the Texas custody decree was a valid judgment under Texas law, i.e., that Texas had jurisdiction over the parties and over the subject matter. The Louisiana court has refused to give full faith and credit to the Texas decree purely and simply because the Texas decree was not rendered in strict accordance with the procedural framework of Louisiana's version of the Uniform Child Custody Jurisdiction Act. The United States Constitution provides that valid judgments of a sister state must be given full faith and credit by the other states of the Union, and there is no sound basis on which custody decrees may be excluded from the operation of the Full Faith and Credit Clause of the United States Constitution. Although it is well settled that the custody decree may be modified if there exists a sufficient change of circumstances to warrant such a modification in the best interests of the children, the issue of changed circumstances is not present in this case. Louisiana has arbitrarily and capriciously refused to give full faith and credit to the Texas custody decree in direct violation of the

Full Faith and Credit Clause of the United States Constitution. The judgment of the Court of Appeal, Third Circuit, State of Louisiana, should be reversed and the Texas custody decree recognized as valid and enforceable in the State of Louisiana.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the Brief for the Petitioner were mailed, postage prepaid, to Martin S. Sanders, Jr., P.O. Box 190, Winnfield, Louisiana 71483, counsel for respondent, and I further certify that all parties required to be served have been served.

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# Supplemental Petitioner's Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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JOHONNAS JUSTUS EICKE, Petitioner,
v.
ELIZABETH LARUE EICKE, Respondent.

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**ON WRIT OF CERTIORARI TO THE**
**COURT OF APPEALS, THIRD CIRCUIT**
**STATE OF LOUISIANA**

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# SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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PETITION FOR CERTIORARI FILED JANUARY 4, 1982
CERTIORARI GRANTED MAY 17, 1982
BRIEF FILED JULY 8, 1982
REPLY BRIEF FILED NOVEMBER 19, 1982
SUPPLEMENTAL BRIEF FILED DECEMBER 28, 1982

## QUESTION PRESENTED

What effect, if any, does the enactment of the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A, have on this case?

# CITATIONS

## CASES:

Emory v. Emory, 223 So. 2d 680 (La. App. 4th Cir. 1969) 4,10

Fountain v. Fountain, 365 So. 2d 1139 (La. App. 1978) 4,10

Hall v. Ponds, 336 So. 2d 59 (La. App. 1st Cir. 1976) 8

Hill v. Hill, 304 So. 2d 922 (La. App. 1st Cir. 1974) 4,10

Lusher v. Kilcrease, 384 So. 2d 589 (La. App. 4th Cir. 1980) 8

Minnesota Law Review, Vol.66, No.5 June, 1982, "Interstate Child Custody: Jurisdiction, Recognition, and Enforecement," Russell M. Coombs,
- page 819 6
- page 838 7
- page 838 11

Moosy v. Huckabay Hospital, Inc., 283 So. 2d 699 (La. 1973) 8

Sanchez v. LeBlanc, 400 So. 2d 349 (4th Cir. 1981), Writ denied 1981 8

Traylor v. Shell Oil Co., 400 so. 2d 342 (4th Cir. 1981), Writ Denied, 405 So. 2d 530 (1981) 8

Webb v. Webb, 101 S. Ct. 1889, 1891 9

Webster v. Webster, 308 So. 2d 302 (La. App. 1st Cir. 1975) 4,10

The enactment by Congress of the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. 1738A, should have no effect upon the ultimate decision rendered by the United States Supreme Court in this case. Rather, that decision should be based upon Article IV, Section 1, of the United States Constitution, 28 U.S.C. 1738, and the last-in-time rule for the reasons set forth in the original and reply briefs filed on behalf of the petitioner herein. There are five (5) basic reasons why the PKPA has no effect on this litigation:

(1) The PKPA did not become effective until after both the Louisiana and the Texas custody decrees became final;

(2) The PKPA does not have retroactive application;

(3) Even if it is assumed that the PKPA does have retroactive application, respondent has waived her rights thereunder by failing to raise them in the Louisiana courts, and this waiver is an independent and adequate state grounds which prevents this Court from reaching the federal question;

(4) Respondent failed to carry her burden of proof establishing the jurisdictional criteria of the PKPA; and

(5) Even if it is assumed that the PKPA may be raised by respondent at this point in the litigation, the PKPA does not provide the law applicable to the peculiar facts of this case.

Although there appears to be some dissention among the commentators as to the effective date of the PKPA, the earliest date on which it could have been effective is December 29, 1980. The Louisiana custody decree was rendered on December 14, 1979, and the Texas custody decree was rendered on June 18, 1980, with both judgments becoming final well before the earliest possible effective date of the PKPA. In fact, the PKPA did not become effective until this case was on appeal to the Court of Appeal, Third Circuit, State of Louisiana. It is a basic principle of law that the subsequent enactment of legislation may not abrogate, and thereby reverse, final judgments of the Courts of this nation.

The argument which will apparently be made to urge the applicability of the PKPA would require that it be given retrospective application so as to provide Louisiana with a legitimate ground on which to deny full faith and credit to the final Texas custody decree. However, there does not appear to be any sound basis on which the PKPA can be declared retroactive.

First, the statute itself does not specifically provide for retrospective applicability of its provisions, and likewise, there is no apparent legislative intent shown by the legislative history to support such a proposition.

Second, the only argument which might be raised to support retroactive application of the PKPA is that the petitioner would not be unreasonably prejudiced by its retroactive application since he had no reasonable expectation that the Texas custody decree would be given full faith and credit in Louisiana because of the pointed refusal by this Court to so rule in the past. Although it is indeed true that this Court has not made such a pronouncement, Louisiana jurisprudence has specifically held that a divorce decree and a custody decree incidental thereto rendered in a sister state with jurisdiction is entitled to full faith and credit in Louisiana. *Fountain v. Fountain*, 365 So. 2d 1139 (La. App. 1978); *Webster v. Webster*, 308 So. 2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill*, 304 So. 2d 922 (La. App. 1st Cir. 1974); *Emory v. Emory*, 223 So. 2d 680 (La. App. 4th

Cir. 1969). Thus, petitioner had every reasonable expectation that the Texas decree would be given full faith and credit under Louisiana law regardless of the absence of United States Supreme Court decisions in support thereof. Retroactive application of the PKPA would thereby thwart the reasonable expectations of petitioner in addition to unsettling established principles of domestic and jurisdictional law in Louisiana without giving parties adversely affected thereby reasonable and adequate notice.

Third, for the PKPA to have retroactive application in this case, its retroactivity must be *unlimited* in scope. Since both the Louisiana and the Texas decrees have become final under the laws of the respective states, application of the PKPA to either of those decisions would mean that any other "final" custody decree of any other state would be subject to review under the PKPA jurisdictional standards. If this were to occur, it would cause extraordinary instability in child custody litigation in that thousands, if not millions, of heretofore "final" judgments would be open to judicial scrutiny to determine if the jurisdictional guidelines of the PKPA had been met. Obviously, the Congressional intent was to promote cooparation between state courts and to discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child. To give the PKPA retrospective application would certainly thwart these ideals and principles.

Fourth, the enactment of the PKPA was not a peremption nor a limitation by Congress of constitutional full faith and credit under 28 U.S.C. 1738. Although this Court has reserved the issue of whether Article IV full faith and credit applies to custody decrees, the enactment of the PKPA should not be viewed as a Congressional pronouncement limiting the applicability of 28 U.S.C. 1738. The PKPA is a specific statute dealing solely with custody, and neither by its terms nor in the legislative history is there any indication that the enactment of this statute has somehow removed custody litigation from the general principles of constitutional full faith and credit to which 28 U.S.C. 1738 would apply. Rather, it is apparent that Congress intended to supplement, not supplant, 1738 by the enactment of 1738A. To hold otherwise would result in "final" custody decrees being rendered invalid or otherwise losing protection of 1738 full faith and credit which would certainly destabilize domestic law thereby abrogating Congressional intent.

Professor Russell M. Coombs, who conceived the PKPA and wrote the first several drafts of it, has particularly noted:

> There is no indication in the text of the legislative history of the Wallop Act that Congress intended to render the provisions of 28 U.S.C. 1738 (1976) inapplicable to custody proceedings, or to supplant any requirements imposed in such proceedings by the full faith and credit clause itself. [See 124 Cong. Rec. 787 (1978); infra text accompanying note 771-805.] In addition, it can be doubted that Congress would have the power to take the latter step. [See *Thomas v. Washington Gas Light Co.,* 448 U.S. 271, 272 N. 18 (1980); infra text accompanying note 780.]
>
> Minnesota Law Review, Vol. 66, No. 5, June, 1982, "Interstate Child Custody: Jurisdiction, Recognition, and Enforcement," Russell M. Coombs, page 819, fn. 625.

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Some might suggest, however, that as a result of enactment of Section 1738A, the full faith and

> credit clause and statute are now applicable to custody proceedings only when they are conducted consistently with Section 1738A. Congress may have lacked power to give the new Act that effect.
>
> In any event, neither the statutory text nor any specific language in the legislative history purports such an interpretation of the Act. Instead, it appears that, in adding new statutory duties to those duties which the courts have already held the full faith and credit clause and statute established, the Wallop Act provides criteria only for application of its newly created duties.
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> > Minnesota Law Review, Vol. 66, No. 5, June, 1982, "Interstate Child Custody: Jurisdiction, Recognition, and Enforcement," Russell M. Coombs, page 838.

Assuming, for the sake of argument, that the PKPA is to be given the unlimited retrospective application that would be necessary to make it effective in this case, respondent has nevertheless waived her rights thereunder, pursuant to Louisiana law, by failing to raise them at the trial or appellate levels, and this waiver must be considered as an independent and adequate state grounds which prevents this Court from reaching the federal question. Louisiana jurisprudence mandates that all legal issues not specifically briefed and argued at the appellate level are abondoned.

> We reject plaintiff's claim for 4% of 75% of the cost for air conditioning. He apparently has abandoned this claim since he neither argued not briefed it before this Court, and the record is devoid of any proof of this cost, although it is alleged in the petition that there was a low bid for $130,000 on

> this item. *Moosy v. Huckabay Hospital, Inc.*, 283 So. 2d 699 (La. 1973).
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> •••
>
> In the Trial Court, plaintiff-appellant argued that Act 46 of the 1976 Regular Session was a "local or special" law and thus violative of Art. 3, Section 13, Louisiana Constitution (1974) for failure to publish the intention to introduce this legislation. Inasmuch as appellant has neither briefed nor argued orally this point before this Court, we consider it abandoned.
> *Hall v. Ponds*, 336 So. 2d 59
> (La. App. 1st Cir. 1976).
>
> See also *Traylor v. Shell Oil Co.*, 400 So. 2d 342 (4th Cir. 1981), Writ denied, 405 So. 2d 530 (1981); *Sanchez v. LeBlanc*, 400 So. 2d 349 (4th Cir. 1981), Writ denied 1981; and *Lusher v. Kilcrease*, 384 So. 2d 589 (La. App. 4th Cir. 1980).

It is well established that the jurisdiction of this Court to reexamine a final judgment of a state court can exist only where the record, taken as a whole, either expressly or by clear implication establishes that the federal claim was adequately presented in the state system. This Court has specifically denied writs of certiorari in custody litigation substantially similar to the instant case where the federal claim was not adequately presented.

> Because this case comes to this Court from a State Court, the relevant jurisdictional statute is Title 28 U.S.C. 1247. As applied to the circumstances of this case, that statute requires that in the State Courts petitioner have "specially set up or claimed under the constitution (of) the United

> States" that right which he now seeks to have this Court enforce. 28 U.S.C. 1247 (3). Similarly, our Rule 21.1(H) requires the petitioner to "specify the stage in the proceedings, both in the Court of the first instance and in the Appellate Court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court." Our examination of the record convinces us that petitioner failed properly to raise or preserve a claim under the Full Faith and Credit Clause of the Federal Constitution in the Georgia Courts.
>
> We note first that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon. Nor is any federal issue mentioned by the dissenting opinion in that Court. This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts unless the aggrieved party in this Court can affirmatively show the contrary."
>
> *(Webb v. Webb,* 101 S. Ct. 1889, 1891)

Even assuming that the PKPA must be given unlimited retroactive application and that respondent has adequately presented the federal question to the Louisiana state court system, respondent has nevertheless failed to carry her burden of proving the jurisdictional criteria established in the Act. In short, respondent, under Louisiana law, has the burden of establishing that the Texas court was without jurisdiction to render the custody decree.

> Under the Full Faith and Credit Clause of the United States Consitution, Louisiana Courts recognize the validity of awards of custody made by foreign Courts. E.g., *Tennyson v. Tennyson*, 263 So. 2d 88 (La. App. 1st Cir. 1972); *Lege v. Lege*, 228 So. 2d 202 (La. App. 3rd Cir. 1969); *Brewer v. Macaluso*, 221 So. 2d 343 (La. App. 4th Cir. 1969). However, full faith and credit is not due when it is shown that the foreign court did not have jurisdiction to make such an award. *Williams v. North Carolina*, 325 U.S. 226 (1945); *Whatley v. Whatley*, 312 So. 2d 149 (La. App. 1st Cir. 1975). The law used to determine whether the foreign court had jurisdiction is the law of the forum. *State ex rel. Cahill v. James*, 172 So. 2d 299 (La. App. 1st Cir. 1965).
>
> *Fountain v. Fountain*, 365 So. 2d 1139, 1141 (La. App. 3rd Cir. 1978).
>
> See Also: *Webster v. Webster*, 308 So. 2d 302 (La. App. 1st Cir. 1975); *Hill v. Hill*, 304 So. 2d 922 (La. App. 1st Cir. 1974); and *Emory v. Emory*, 223 So. 2d 680 (La. App. 4th Cir. 1969).

The applicability of the PKPA is dependent upon certain factual determinations including the domicile of the children, that of the parents and the availability of sufficient evidence for the trial court to consider. Thus, for respondent to avail herself of the benefits of the Act, she must carry her burden of proving the existence of the necessary facts. Petitioner shows that the record is simply devoid of such evidence, thus limiting the applicability of the Act.

Additional, Professor Russell M. Coombs has correctly noted that if a party "sleeps" on his PKPA rights, inconsistent judgments could be rendered by different states thus requiring the application of 28 U.S.C. 1738 and the last-in-time rule in order to resolve the conflict.

> A result of the Wallop Act's limitation on the application of its criteria is that the duties it creates are inapplicable, as are those created by the U.C.C.J.A., to some cases to which the full faith and credit requirements of issue preclusion, and perhaps claim preclusion, do apply. This difference in scope could be of practical importance if litigants frequently fail to ask courts to comply with the duties that the U.C.C.J.A. and section 1738A create, or fail to pursue appellate review to remedy errors. Such failures by litigants could permit decrees made in violation of section 1738A or the the U.C.J.A. to become final and under the full faith and credit clause and statute, perhaps nationally preclusive of the claim and issues decided. Although constitutional preclusion of claims would rarely be of great practical importance, to allow a decree made in violation of section 1738A or of the U.C.C.J.A. to preclude relitigation of issues could have significant consequences in later litigation.
>
> Minnesota Law Review, Vol. 66, No. 5, June, 1982, "Interstate Child Custody: Jurisdiction, Recognition and Enforcement," Russell M. Coombs, page 838.

Again, if it is assumed that the PKPA has unlimited retroactive application, respondent has nevertheless failed to properly and adequately present her PKPA claims thus resulting in inconsistent judgments in Texas and Louisiana. Once this anomaly has occurred, the PKPA is of no value in resolving the conflict; rather, the general rule of federal full faith and credit, under 1738, must be applied in conjunction with the last-in-time rule in order to resolve the conflict. Since the Texas decree was the last-in-time, it is entitled to federal full faith and credit and should have been enforced by the Louisiana courts. This application will not lead to inequitable results and does not result in forum shopping for the reason that 28 U.S.C. 1738 is, in reality, a first-in-time rule. Although this propisition may seem contradictory, the application of federal full faith and credit uner 1738 enhances the quick resolution of jurisdictional conflicts by encouraging those with claims or defenses to raise them at the earliest possible time so as to get the benefit of federal full faith and credit. As applied to the facts of this case, respondent could have appeared in the Texas proceedings and raised her prior Louisiana custody decree as a defense to the claims asserted by petitioner herein. Had she done so, 1738 full faith and credit, with its claim and issue preclusiveness, would have prevented the Texas court from relitigating the issue of best interests of the child unless petitioner had been able to show an adequate "change in circumstances" which would have allowed the Texas court to modify the prior Louisiana custody decree under existing principles of constitutional law.

The peculiar facts of this case clearly delineate the policy reasons which support a judgment in favor of petitioner herein. The Louisiana cousts have rejected the application of federal full faith and credit totally, and this Court should use an equally broad brush in reversing that decision. Otherwise, there will be no law to control situations where one party has inadequately protected his own rights, and, consequently those of the child. Although the PKPA purports to enact a comprehensive system to regulate interstate custody litigation, federal full faith and credit under 28 U.S.C. 1738 and the last-in-time rule are absolutely necessary to add stability and finality to custody decrees where one or both parties do not adequately present either the PKPA legal issues or the facts necessary to determine the state of proper jurisdiction under the PKPA guidelines.

Additionally, even if all of the above factors are concluded in favor of applying the PKPA, the posture of this case renders the PKPA inapplicable: the PKPA simply does not provide the law for these facts. At the time of the rendition of the Louisiana custody decree, Texas was the home state of the children under 1738A(c)(2)(A) because the children had only been in Louisiana for approximately two (2) months when the suit was filed and only about four (4) months when the judgment was rendered. Thus, the Louisiana decree is invalid for lack of jurisdiction under the express provisions of the PKPA. Also, the Texas decree does not comply with the PKPA because Louisiana had become the home state of the children by the time petitioner had filed suit in Texas in April, 1980. Therefore, since neither decree complies with the express provisions of the PKPA, it does not provide the necessary law to resolve this conflict. Only by the application of federal full faith and credit under 28 U.S.C. 1738 and the last-in-time rule can a proper resolution of this dispute be made. Louisiana's total rejection of federal full faith and credit as applied to these facts, if allowed to remain intact, seriously jeopardizes our national judicial system by undermining the most basic constitutional principles of federalism. The Parental Kidnapping Prevention Act is not a substitute for federal full faith and credit in these circumstances.

## CONCLUSION

For the foregoing reasons, it is shown that the Parental Kidnapping Prevention Act, 28 U.S.C. 1738A, should have no effect upon this litigation. Additionally, it is further shown for the reasons stated hereinabove, that the peculiar facts of this litigation are ample proof that this Court should reverse the Louisiana Appellate Court and its complete rejection of full faith and credit to custody decrees. A cohesive and rational national policy can and should be developed to achieve cooperation between the courts of the various states and to discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child. This can only be accomplished by interweaving traditional concepts of federal full faith and credit under 28 U.S.C. 1738 (issue preclusion, claim preclusion and last-in-time rule) with the specific duties and responsibilities required by the Parental Kidnapping Prevention Act. Although the PKPA is major legislative step in achieving these goals, it does not provide all the answers nor does it deal with all factual situations. In those situations, like the instant case, which fall outside the perameters of the PKPA, federal full faith and credit is necessary to complete a rational national policy which will foster the best interests of the children.

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# Respondent's
# Brief

NO. 81–1284

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

JOHONNAS JUSTUS EICKE,
Petitioner,

versus

ELIZABETH LARUE EICKE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS,
THIRD CIRCUIT STATE OF LOUISIANA

## BRIEF FOR THE RESPONDENT

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# TABLE OF CONTENTS

Page

Statement of the Case . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .1

Summary of Argument . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .2

Argument:

THE DECISION BELOW IS CORRECT IN DENYING RECOGNITION TO THE CUSTODY DECREE OF THE 237th DISTRICT COURT IN AND FOR LUBBOCK, COUNTY, TEXAS . . . . . . . . . . . . . . . . .3

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .8

## TABLE OF AUTHORITIES

Page

*Cases:*

*Alaska Packers Ass'n v. Industrial Accident Comm'n* 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1004 (1935) . . . .4

*Estin v. Estin,* 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948) . . . . . . . . . . . . . . . . . . . . . . . . . . .5, 6

*Kovaks v. Brewer,* 356 U.S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008 (1958) . . . . . . . . . . . . . . . . . . . . . . . . . . .6, 7

*May v. Anderson,* 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1952) . . . . . . . . . . . . . . . . . . . . . . . . . . .6, 7

*New York Ex Rel. Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947) . . . . . . . . . . . . . .4, 7

*Vanderbilt v. Vanderbilt,* 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456 (1957) . . . . . . . . . . . . . . . . . .5, 6

*Williams v. State of North Carolina,* 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942) . . . . . . . . . . . . . . . . .5

NO. 81–1284

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

---

# BRIEF FOR THE RESPONDENT

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## STATEMENT OF THE CASE

Petitioner and Respondent were married in Ketchikan, Alaska on January 3, 1974. Subsequent to the marriage, petitioner and respondent resided in Louisiana and, eventually, in Texas. Two children were born of the marriage. Petitioner and respondent last lived together in Texas from April until August of 1979. In August of 1979 the respondent and the two children left Texas, moved to LaSalle Parish, Louisiana, and established Louisiana as their domicile. Respondent filed suit in the Twenty-eight Judicial District Court, State of Louisiana seeking a separation from the petitioner and custody of the two children; judgment to that effect was rendered on December 14, 1979. The petitioner made no appearance in that proceeding, and an attorney was appointed pursuant to LSA-C.C.P. art. 5091 to represent him.

In July of 1980 the petitioner brought an action in the Twenty-eighth Judicial District Court, State of Louisiana, seeking recognition of a Texas of divorce and an accompanying custody decree. Neither the respondent nor the children had made any appearance in the Texas court; the children had resided continuously in Louisiana since August of 1979. The Twenty-eighth Judicial District Court recognized the Texas judgment of divorce but denied recognition to the Texas custody decree on the grounds that Texas did not have jurisdiction over the children and, further, that Texas had not acted in such a manner as to require recognition of the decree under the Uniform Child Custody Jurisdiction Act which Louisiana had adopted.

Petitioner appealed the District Court decision to the Court of Appeal, Third Circuit, State of Louisiana; a majority of that Court affirmed the decision of the trial court. The petitioner's request for a rehearing was denied on July 8, 1981. On October 9, 1981, The Supreme Court of the State of Louisiana unanimously denied petitioner's application for a writ of review.

## SUMMARY OF ARGUMENT

This Court need not grant full faith and credit to the Texas custody decree. There have been many instances in which this court has held that full faith and credit cannot be literally applied, especially in domestic litigation. The Louisiana courts have acted consistently with the prior "divisible divorce" decisions of this court in which full faith and credit has been granted to the divorce decree but denied to an accompanying decree concerning one of the marital incidents such as child custody, alimony, or child support.

This Court has also noted in its previous decisions that special policy considerations come into play when dealing with the custody of children. Where a rendering state can meet only minimal due process standards, another state which is the home of the children should not be required to bow to that decree in contravention of its own jurisdiction and strong policies.

## ARGUMENT

The decision below is correct in denying recognition to the custody decree of the 237th District Court in and for Lubbock County, Texas.

The petitioner asserts that Louisiana must grant full faith and credit to the Texas custody decree; the respondent asserts that the Louisiana courts were correct in denying recognition to the Texas custody decree and leaving in effect the earlier Louisiana decree. Petitioner originally based his claim on a rule of Louisiana jurisprudence: a judgment of divorce abates all incidents of the previous judgment of separation. It was the petitioner's contention that this jurisprudential rule must be applied in this case and that its application would result in the Texas decree being the only one extant. When the Louisiana courts unanimously held that any such prior jurisprudential rule had been overruled by the adoption of the Uniform Child Custody Jurisdiction Act[1], the petitioner then asserted that the Texas custody decree was protected under Article IV, Section 1 of the United States Constitution and must be recognized.

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[1] **Louisiana Revised Statutes 13:1700 through 13:1724.**

At the time the petitioner commenced his action for a divorce in Texas, there existed a judgment of custody from the Twenty-eighth Judicial District Court, State of Louisiana, that all parties acknowledge was valid. The fact that petitioner's original approach to this matter was to have the Louisiana court set aside its own judgment shows the validity which petitioner accorded it. The importance of this background is that it shows the position that the Louisiana court was placed in when asked to recognize the Texas judgment of custody: Louisiana was not merely asked to recognize and give effect to a foreign judgment, but instead was asked to set aside its previous judgment and substitute that of another state. Louisiana was asked to substitute the judgment of a state in which the children affected had not resided for a period in excess of ten months; in which neither the children nor the respondent had appeared; and in which the petitioner had deliberately withheld information of the previous Louisiana custody decree. In denying recognition to the Texas custody decree, the Louisiana courts were acting in accordance with the Uniform Child Custody Jurisdiction Act and in accordance with the principles set down by this Court in its previous decisions.

This Court has observed many times that there exist exceptions to the literal command of full faith and credit. See *Alaska Packers Ass'n v. Industrial Accident Comm'n,* 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044 (1935) and *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). It was in *Alaska Packers* that this Court stated:

> . . . there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." 2/

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2/ ***Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. at 546, 55 S. Ct. at 523, 79 L.Ed. at 1051.**

One of the principal rationales for excepting some judgments from the scope of full faith and credit is the relationship that exists between full faith and credit and due process. This has been especially so in the field of domestic litigation, as the previous decisions of this Court show.

The thrust of the petitioner's claim is centered around *Williams v. State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942). That case established that *ex parte* divorce decrees were entitled to full faith and credit. What the petitioner has failed to do, however, is to consider those cases which followed *Williams* dealing with the effect of *ex parte* dispositions of such matters as alimony, child custody, and child support. The principal case in this regard is *Estin v. Estin*, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948). In the *Estin* case the idea of "divisible divorce" was introduced. In that case the Court held that an *ex parte* Nevada divorce decree which purported to terminate an absent wife's alimony rights under a New York separation decree was entitled to full faith and credit insofar as it dissolved the marriage, but not with respect to alimony. This principal was then extended in *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360, 1 L. Ed.2d 1456 (1957) where the Court held that denial of alimony in an *ex parte* divorce proceeding was not entitled to full faith and credit, even though the wife's rights had not been embodied in a prior judgment as in *Estin*, supra.

The petitioner would distinguish *Estin*, supra, and *Vanderbilt*, supra, from the instant case be asserting that those previous cases dealt with a question of jurisdiction. The fact is that the trial court specifically found that Texas did *not* have jurisdiction over the custody of the children Joint Appendix 14). While the Louisiana Court of Appeal, Third Circuit stated that Texas did have jurisdiction, that holding was dicta because the Court of Appeal never reached the question of jurisdiction. Their decision was based on the recognition of judgments section of the Uniform Child Custody Jurisdiction Act (Joint Appendix 15). What is important is that the reasoning that this Court used in both *Estin* and *Vanderbilt*, supra, should be applicable in this case, especially where the facts are analogous. In this case Louisiana had awarded the custody of the children to the respondent. In the petitioner's divorce action in Texas, the Texas court acted in a manner to terminate that decree. The petitioner then tried to enforce that judgment in Louisiana, where the trial court applied the divisible divorce rationale and recognized the divorce but not the custody decree. The Twenty-eighth Judicial District Court, State of Louisiana, was proceeding exactly as this Court had done earlier in both *Estin* and *Vanderbilt*, supra. The soundness of such a procedure was explained by Justice Harlan in his separate opinion in *Vanderbilt*. Justice Harlan reasoned that if it is due process for a foreign state to render an *ex parte* divorce decree, then it is probably due process for them to render a decree as to a marital incident. But when that marital incident strongly implicates another state's strong local interest in the welfare of its residents, non-recognition would not offend the full faith and credit clause.3/

It is true that both *Estin*, supra, and *Vanderbilt*, supra, dealt with alimony, not child custody. However, in the case of *May v. Anderson*, 345 U.S. 528, 73 S. Ct. 840, 97 L.Ed. 1221 (1953) this Court established that child was a marital incident, like alimony, and was, therefore, subject to strong local policies that could outweigh the demands of full faith and credit under the rationale of *Estin*, supra. It would seem that any concerns for local interests that were present in *Estin* would only be greated when dealing with

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3/ *Kovaks v. Brewer*, 356 U.S. at 614, 78 S. Ct. at 969, 2 L. Ed. 2d at 1015.

child custody. Indeed, it was in his concurring opinion in *May*, supra, and later in *Kovaks v. Brewer*, 356 U.S. 604, 78 S. Ct. 963, 2 L.Ed.2d 1008 (1958) that Justice Frankfurter pointed out the inappositeness of full faith and credit to custody determinations:

> The minimum nexus between court and child that must exist before the court's award of the child's custody should carry any authority is that the court should have been in a position adequately to inform itself regarding the needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment.[3/]

The petitioner in his brief asserts that all of Justice Frankfurter's concerns expressed in *Kovaks*, supra, would now be alleviated by the principle that all custody decrees are subject to modification. Yet in *Halvey*, supra, that is the proposition that this Court had dealt with, the power of a second state to modify the custody decree of the rendering state. It is difficult to see that if such a principle would have comforted Justice Frankfurter, why he was still concerned in *Kovaks*, supra, more than ten years after the decision in *Halvey*, supra.

This Court has never addressed the question which is put before it by this case. The Court has indicated, however, in its previous decisions (*Halvey*, supra; *May*, supra, and *Kovaks*,

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[3/] *Kovaks v. Brewer*, 356 U.S. at 614, 78 S. Ct. at 969, 2 L. Ed.2d at 1015.

supra) that individual states may have greater leeway to deny recognition to foreign custody decrees. This is based on the great interest that a state has in the children residing within its borders. Louisiana most certainly has such an interest in this instance; Texas, on the other hand, had almost no such interest at the time the petitioner filed suit and received his decree there. To require Louisiana, the home state of the respondent and her children, to give effect to a custody decree from a state in which those same children have not resided in over three years would certainly go against the policy this Court has previously articulated. The petitioner asserts that if Louisiana is allowed to deny recognition to the Texas decree such a decision will foster forum-shopping. It would seem that the petitioner has no such reservations about the effect a decree requiring recognition would have: that Texas, using minimal due process standards, may issue a decree over non-resident children that Louisiana, the children's home state, must recognize and enforce despite Louisiana's previous disposition of the matter and continuing jurisdiction of the matter.

## CONCLUSION

For the reasons recited above, it is submitted to the Court that the judgment of the Louisiana Court of Appeal, Third Circuit should be affirmed denying recognition to the custody decree of the 237th District Court in and for Lubbock County, Texas.

Respectfully submitted,

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# Supplemental Respondent's Brief

NO. 81-1284

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versus

ELIZABETH LARUE EICKE,
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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, THIRD CIRCUIT STATE OF LOUISIANA

## SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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## TABLE OF CONTENTS

Page

Summary of Argument . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 2

Argument:

THE PARENTAL KIDNAPPING PREVENTION ACT, 28 U.S.C. 1738A SHOULD BE APPLICABLE TO THIS CASE . . . . . . . . . . . . . . . . . . 2

THE PARENTAL KIDNAPPING PREVENTION ACT WOULD DENY RECOGNITION TO THE CUSTODY DECREE OF THE 237TH DISTRICT COURT IN AND FOR LUBBOCK COUNTY, TEXAS . . . . . . . . . . . . . . . . . . . . . . . . . . 4

Conclusion . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

## TABLE OF AUTHORITIES

**Page**

*Haggar Co. v. Helvering*, 308 U.S. 389, 60 S.Ct. 337, 84 L.Ed. 340 (1940) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

*Robertson v. Bradbury*, 132 U.S. 491, 10 S.Ct. 158, 33 L.Ed. 405 (1889) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 3

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

---

# SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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## SUMMARY OF ARGUMENT

The Parental Kidnapping Prevention Act (PKPA) was enacted on December 28, 1980. Because the literal wording of the Act dealing with the effective date of the PKPA is inconsistent with the PKPA, it should be held that the PKPA became effective on its date of enactment. On the date of enactment of the PKPA, the instant case was pending before the Court of Appeal, Third Circuit, State of Louisiana. The PKPA should be held applicable to the instant case.

If the PKPA is held to be applicable to the instant case, it would require that Louisiana not recognize the Texas custody decree. Similarly, the Louisiana custody decree would be one enacted consistently with the provisions of the PKPA and entitled to recognition by Texas. Louisiana was acting under the provisions of the Uniform Child Custody Jurisdiction Act, which sets forth standards almost identical to those contained in the PKPA. The Court should hold that the PKPA is applicable to this case and affirm the decision of the Louisiana Court of Appeal, Third Circuit.

## ARGUMENT

### *The Parental Kidnapping Prevention Act, 28 U.S.C. 1738A should be applicable to this case.*

In determining whether or not the Parental Kidnapping Prevention Act (PKPA) is applicable to the instant case, it is necessary to first determine the effective date of the provisions. The PKPA was enacted December 28, 1980; Section 2 of the "Act" which contains the PKPA states: "The amendments made by this Act shall take effect on, and apply to services furnished on or after, July 1, 1981." Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96-611, §2, 94 Stat. 3566 (1980).

Is this provision controlling? There would seem to be some question because of the structure of the "Act." Sections 1 through 5 and Section 11 of the "Act" are technical amendments to the Social Security Act. The PKPA is set forth in Sections 6 through 10 of the "Act," the short title of the PKPA appearing at Section 6, and the structure of the "Act" indicating that the PKPA is separate and distinct.

Contained in Section 10 of the "Act" is a requirement that the Attorney General of the United States report to Congress 120 days after the enactment date of the PKPA concerning the steps taken to enforce it. Section 10 makes no sense if one finds that Section 2 controls the PKPA and makes it become effective on July 1, 1981. In this case, a literal application of Section 2 of the "Act" to the PKPA would produce absurd results. In such a case, one must look for a reasonable application that is consistent with legislative purpose. *Haggar Co. v. Helvering*, 308 U.S. 389, 60 S.Ct. 337, 84 L.Ed. 340 (1940).

If the PKPA does not have an express effective date, the enactment date would become the effective date. *Robertson v. Bradbury*, 132 U.S. 491, 10 S.Ct. 158, 33 L.Ed. 405 (1889). In the facts of the instant case, the District Court had rendered its decision on September 2, 1980. The Third Circuit Court of Appeal, however, did not render its decision until July 8, 1981; thus, this case was pending before the appellate court when the PKPA became effective.

Article VI, clause 2 of the United States Constitution would make the PKPA applicable to the pending case; the PKPA was passed by the Congress under the constitutional grant of power to define the requirements of the full faith and credit clause (U.S. Const. Art. IV, §1). The PKPA was in effect at the time this case was pending before the Third Circuit Court of Appeal, State of Louisiana, and should be held applicable to this case.

> ***The Parental Kidnapping Prevention Act would deny recognition to the custody decree of the 237th District Court in and for Lubbock County, Texas.***

The respondent was granted the custody of her two children by a judgment of the Twenty-Eighth Judicial District Court in and for the Parish of LaSalle, State of Louisiana, on December 14, 1979. The petitioner was granted custody of the two minor children by a judgment of the 237th District Court in and for Lubbock County, Texas, on June 18, 1980. The Texas custody decree was acting to modify the decree previously rendered by the Louisiana court. Concerning this situation, the PKPA provides:

> A court of a State may modify a determination of the custody of the same child made by a court of another State, if–
>
> (1) it has jurisdiction to make such a child custody determination; and
>
> (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination. 28 U.S.C. §1738A(f).

The language of the PKPA plainly addresses the situation presented in this case and would prevent Texas from exercising jurisdiction to modify the Louisiana decree. Even if it can be said that Texas has managed to acquire jurisdiction over the absent children as (1) requires, the facts clearly show that Louisiana never lost its jurisdiction over the children as required by (2). The children resided in Louisiana constantly from August, 1979, until the present. Likewise, Louisiana has never declined to exercise such jurisdiction; the petitioner has never sought to have the Louisiana decree modified in the courts of Louisiana.

Is the Louisiana custody decree consistent with the provisions of the PKPA? Under 28 U.S.C. 1738A(c)(2)(A), Louisiana would meet the requirement of being the home State of the two children at the time Louisiana exercised its jurisdiction over them. The facts also show that at the time Louisiana first exercised its jurisdiction over these children, there had never been such an exercise of jurisdiction by any other state.

The requirements of U.S.C. 1738A(c) follow closely those of the Uniform Child Custody Jurisdiction Act (UCCJA) [Louisiana Revised Statutes 13:1700 through 13:1724]. This Court has indicated previously that the proper solution to factual situations such as presented by this case is to carefully weigh extension of jurisdiction to child custody decrees, especially modifications of previous decrees by another State. Consistent with those indications are the ideals contained within the PKPA and the UCCJA. Those principles set forth in the UCCJA are an intimate part of the instant case. The PKPA should be held applicable to this case, and those same principles be applied consistently to reach the conclusion which Congress has clearly intended.

## CONCLUSION

For the reasons cited above–in addition to those set forth in respondent's original brief–it is submitted to the Court that the judgment of the Louisiana Court of Appeal, Third Circuit, should be affirmed denying recognition to the custody decree of the 237th District Court in and for Lubbock County, Texas.

Respectfully submitted,

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## QUESTION PRESENTED

Whether Louisiana may refuse to give full faith and Credit under provisions of Article IV, Section 1 of the United States Constitution, and those acts of Congress enacted pursuant to it, to a judgment of custody rendered in Texas, subsequent to an original judgment of custody in Louisiana that conflicts directly with the terms of the subsequent, Texas decree.

## TABLE OF CONTENTS

PAGE

QUESTION PRESENTED .......... i

INTEREST OF THE AMICI CURIAE .......... 1

SUMMARY OF ARGUMENT .......... 2

ARGUMENT:

LOUISIANA NEED NOT GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE 237TH DISTRICT COURT OF LUBBOCK COUNTY, TEXAS, UNDER ARTICLE IV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES, AND 28 U. S. C. 1738, FOR THE FOLLOWING REASONS:

A. If the Judgment of the 237th District Court of Lubbock County, Texas, receives full faith and credit, it will virtually nullify provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) which governs jurisdiction over child custody decrees, and the enforcement and modification of out-of-state child custody decrees in Louisiana and 47 other States of the United States .......... 4

B. The 237th District Court of Lubbock County, Texas, did not have jurisdiction to modify the original Louisiana decree, because that court proceeded as a court with original jurisdiction without knowledge of the prior Louisiana decree, and because the children were neither domiciled nor physically present in Texas .......... 13

PAGE

C. The Judgment of the 237th District Court of Lubbock County, Texas, is not entitled to full faith and credit in Louisiana because strong public policy in Louisiana, grounded both in the welfare of children and the need for uniformity between the states in conformity to the broad principles of full faith and credit, permit Louisiana to refuse enforcement of the Texas judgment .......... 19

D. The Louisiana courts proceeded in this case after December 28, 1980, the effective date of the Parental Kidnapping Prevention Act (PKPA), 28 U. S. C. 1738A, and the PKPA should apply to this case, and would permit Louisiana to refuse enforcement of the Texas judgment .......... 23

## TABLE OF AUTHORITIES

PAGE

### *Cases*

*Alaska Packers Assn.* v. *Calif.*, 294 U. S. 532; 55 S. Ct. 518; 79 L. Ed. 1044 (1934) .......... 19

*Bank of Augusta* v. *Earle*, 13 Peters 519; 10 L. Ed. 274 (1839) .......... 11

*Durfee* v. *Duke*, 375 U. S. 106; 84 S. Ct. 242; 11 L. Ed. 2d 186 (1963) .......... 14

*Estin* v. *Estin*, 334 U. S. 541; 68 S. Ct. 1213; 92 L. Ed. 1561 (1948) .......... 6

*Ex Parte Birmingham*, Sup. Ct. of Tex., 244 S. W. 2d 977 (1952) .......... 17, 18

*Ford* v. *Ford*, 371 U. S. 187; 83 S. Ct. 273; 9 L. Ed. 2d 240 (1962) .......... 6, 8, 9, 12

*International Shoe* v. *Washington*, 326 U. S. 310; 66 S. Ct. 154; 90 L. Ed. 45 (1945) .......... 6

*Kovacs* v. *Brewer*, 356 U. S. 604; 78 S. Ct. 963; 2 L. Ed. 2d 1008 (1958) .......... 5, 7, 8, 12

*Krieger* v. *Krieger*, 334 U. S. 555; 92 L. Ed. 1572 (1948) .......... 6

*Kulko* v. *Superior Court*, 436 U. S. 84; 98 Sup. Ct. 1690; 56 L. Ed. 2d 132 (1978) .......... 5

*May* v. *Anderson*, 345 U. S. 528; 73 S. Ct. 840; 97 L. Ed. 1221 (1953) .......... 5, 6, 7, 8, 12, 21

*Milliken* v. *Meyer*, 311 U. S. 457; 61 S. Ct. 548; 85 L. Ed. 278 (1940) .......... 6, 16

*Milwaukee County* v. *White*, 296 U. S. 268; 56 S. Ct. 229; 80 L. Ed. 220 (1935) .......... 10, 21

*Nevada* v. *Hall*, 440 U. S. 410; 90 S. Ct. 1182; 59 L. Ed. 2d 416 (1981) .......... 10, 11, 14, 19, 21

PAGE

*New York ex rel Halvey* v. *Halvey,* 330 U. S. 610; 67 S. Ct. 903; 91 L. Ed. 1133 (1947) ..... 5, 8, 9, 12

*Pacific Employers Ins. Co.* v. *Industrial Accident Commission,* 306 U. S. 493; 59 S. Ct. 629; 83 L. Ed. 940 (1938) ..... 19

*Pasqualone* v. *Pasqualone,* Ohio, 406 N. E. 2d 1121 (1980) ..... 16

*Pennoyer* v. *Neff,* 95 U. S. 741; 24 L. Ed. 565 (1878) ..... 6

*Pink* v. *A.A.A. Highway Express,* 314 U. S. 201 (1941) ..... 19

*Ponder* v. *Perry,* Tex. Civ. App., 604 S. W. 2d 406 (1980) ..... 18

*Russell* v. *McMurtrey,* 526 S. W. 2d 270 (1975) ..... 14

*Sampsell* v. *Sup. Ct.,* 32 Cal. 2d 763; 197 P. 2d 739 (1948) ..... 18

*Sampeyreac* v. *U. S.,* 32 U. S. 22; 7 Peters 222 (1833) ..... 24, 25

*Seaberg* v. *Brgunier,* 515 S. W. 2d 398 (1974) ..... 14

*Sutton* v. *Leib,* 342 U. S. 402 (1951) ..... 23

*Thornlow* v. *Thornlow,* Tex. Civ. App. 576 S. W. 2d 697 (1979) ..... 18

*Treines* v. *Sunshine Mining Co.,* 308 U. S. 66 (1939) ..... 23

*Williams* v. *North Carolina,* 317 U. S. 287 (1940) .. 6, 14, 16, 21

*Constitutional Provisions*

Article IV, Section 1 ..... 2, 3, 6, 7, 10, 13, 14, 19, 21, 22, 24, 25

PAGE

## *Statutes*

Louisiana Revised Statutes (L.R.S.), 13:1700 to 13:1724 ........ 4, 20

NCCUSL, *Uniform Child Custody Jurisdiction Act* (1968) ........ 1, 2, 4, 5, 10, 12, 13, 15, 16, 17, 20, 21, 22, 23

NCCUSL, Uniform Reciprocal Enforcement of Support Act (1951), Amended 1958, 1968 ........ 5

*Parental Kidnapping Prevention Act,* 28 U.S.C. 1738A ........ 3, 10, 12, 23, 24, 25

Vernon's Texas Code Annotated (VTCA), 11.045; 11.05; 11.051; 11.053; 11.071; 11.08 ........ 13, 14, 15, 16, 18

## *Secondary Sources*

ALI, *Restatement, Conflict of Laws 2d* ........ 18

Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vanderbilt L. Rev. 1207 (1969) ........ 9

Clark, *The Law of Domestic Relations* (1968) ........ 9

Ehrenzweig, "Interstate Recognition of Custody Decrees," 51 Mich. L. Rev. 345 (1953), revised in *Selected Readings on Conflict of Laws* Culp. Ed. (1956) ........ 9

Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings," 64 Mich. L.Rev. 1 (1965) ........ 9

PAGE

Hazard, "May v. Anderson, Preamble to Family Law Chaos," 45 Va. L.Rev. 379 .......................... 9

Joint Hearing Subcommittee on Criminal Justice of the Committee on the Judiciary and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources of the U.S. Senate, *Parental Kidnapping Prevention Act of 1975*, S.105, U.S. Senate, 96th Congress (January 30, 1980) ...................... 10

Ratner, "Child Custody in the Federal System," 62 Mich. L. Rev. 795 (1964) .................................... 9

Sampson, "Jurisdiction in Divorce and Conservatorship Suits," 8 Tex. Tech L.Rev. 159 (1976) ............................................................ 14, 17

*Miscellaneous*

Petition for Writ of Certiorari, *Eicke* v. *Eicke*, No. 81-1284, Supreme Court of the United States...... 13, 14, 17, 20, 22, 23

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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JOHONNAS JUSTUS EICKE,
*Petitioner,*

*vs.*

ELIZABETH LARUE EICKE,
*Respondent.*

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# BRIEF AMICI CURIAE FOR THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS ON BEHALF OF THE RESPONDENT

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## INTEREST OF THE AMICI CURIAE

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a national organization of the legal profession and of state government, which is dedicated to the principle of uniformity in state law in those subject areas of the law for which the policy of uniformity overcomes individual state interests. As the institution of state government so designated and supported by the many states for this purpose, the NCCUSL completed the Uniform Child Custody Jurisdiction Act (UCCJA) in 1968. The UCCJA has been adopted in 48 states, including the state of Louisiana, in which the Respondent and her children reside, and in which the parties litigated their dispute. The UCCJA provided the statutory basis under which the courts of Louisiana decided this action. The NCCUSL is the only institution in the U.S. which can provide this Court with the national perspective on child custody matters and the UCCJA. In addition, any ruling by this Court will have substantial effect upon further adoptions of the UCCJA in the remainder of the states, and may influence, materially, the policies the UCCJA purports to serve. The NCCUSL, its President, and its Legal Counsel have prepared this appearance on behalf of the NCCUSL.

## SUMMARY OF ARGUMENT

I. If this Court grants full faith and credit to the subsequent Texas decree in this case, the decision will conflict with the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), which governed the decisions of the Louisiana courts, and is, also, in effect in 47 other states. The UCCJA was drafted to cure defects in the handling of interstate child custody disputes created by past decisions of this Court. This Court has, by its decisions, encouraged state autonomy in the enforcement and modification of the decrees of another state. In turn, contestants in custody cases have been encouraged to relitigate cases from state to state, and to engage in undesirable self-help practices such as seize and run. The UCCJA, taking into account the existing decisions of this Court, and the complexity of the problem, purports to fill the gap which Article IV, Section 1 has failed to fill. Given this background, it would be tragic if Article IV, Section 1 might undo this enormous, existent progress in resolving custody problems.

II. The Texas court lacked jurisdiction over the person and the subject matter of this dispute. The Texas court proceeded as if it had no knowledge of the Louisiana decree. This seems to be true in spite of the mandate of Texas statutes, which require a petitioner to reveal the existence of any court with continuing jurisdiction over the case. These petition requirements are established to permit the Texas court to determine if it has jurisdiction, which it does not have if there is a state with dominant jurisdiction. The only conclusion from these omissions in the Texas proceeding is that jurisdiction over the person and subject matter fails in Texas.

Further, Texas law requires either the domicile or the physical presence of the children for subject matter jurisdiction of a custody modification. The Texas decree modified the Louisiana decree. Since the children were neither physically present nor domiciled in Texas, there is no subject matter jurisdiction in Texas.

III. A strong public policy expressed in the Louisiana statutes, based on Louisiana's historic concern for the children of Louisiana, and for the orderly resolution of interstate custody disputes in the spirit of union between the states and full faith and credit, should permit Louisiana to refuse to enforce the Texas decree. This Court has permitted strong state policy to be the basis for refusing the application of the law of another state, and the same kind of exception should be provided in this case.

IV. The Parental Kidnapping Prevention Act (PKPA), 28 U. S. C. 1738A should apply to this case. This act of Congress, which implements Article IV, Section 1 of the *Constitution of the United States,* became effective during the pendency of this case in the Louisiana courts. Because the issue of full faith and credit is the only issue in this case, the latest expression of congressional power to implement Article IV, Section 1 should apply to a pending, full faith and credit dispute.

## ARGUMENT

### LOUISIANA NEED NOT GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE 237TH DISTRICT COURT OF LUBBOCK COUNTY TEXAS, UNDER ARTICLE IV, SECTION 1 OF THE CONSTITUTION OF THE UNITED STATES, AND 28 U. S. C. 1738, FOR THE FOLLOWING REASONS:

#### A. If the Judgment of the 237th District Court of Lubbock County Texas, receives full faith and credit, it will virtually nullify provisions of the Uniform Child Custody Jurisdiction Act (UCCJA) which governs jurisdiction over child custody disputes, and the enforcement and modification of out-of-state child custody decrees in Louisiana and 47 other states of the United States.

The Amici Curiae assert that this Court should not give full faith and credit to the Judgment of the 237th District Court of Lubbock County, Texas, as Petitioner requests. To do so would create inevitable and disasterous conflict between Article IV, Section 1 of the *Constitution of the United States* and the *Uniform Child Custody Jurisdiction Act* (UCCJA).[1] The UCCJA is the basis upon which the Twenty-Eighth Judicial District Court, State of Louisiana, La Salle Parish, and the Court of Appeal, Third Circuit, State of Louisiana, refused enforcement of the Texas Judgment, and it is the basic law for taking jurisdiction over child custody cases, for determining enforcement and modification of such decrees, and for regulating the interstate adjudication of these cases in 48 states.[2]

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[1] NCCUSL, Uniform Child Custody Jurisdiction Act (1968): L.R.S. 13:1700 to 1724.

[2] These states, from the official records of the NCCUSL ARE: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New

*(Footnote continued on following page)*

Indeed, only Texas and Massachusetts, of the fifty states, have not adopted this Act.

If this Court rules against Louisiana, these states may lose the salubrious state of law their adoption of the UCCJA was meant to produce. If a UCCJA state cannot reject enforcement of a decree of another state that violates the recognition and enforcement rules in the UCCJA, succeeding chains of conflicting decrees with continuing erosion of the homes and wellbeing of children can be the only effect.

The UCCJA, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), in 1968, represents an independent effort by state government to solve child custody problems. The NCCUSL is an institution of state government, created cooperatively by the states, to provide them with the means to resolve interstate problems. The UCCJA is an important example of that cooperative spirit within the states.[3]

Just why this approach was tried rests, in part, upon certain decisions made by this Court, beginning in 1947.[4] This Court

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*(Footnote continued from preceding page)*

Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Along with the two states that have not adopted the UCCJA, are the District of Columbia and Puerto Rico.

[3] Another of the acts promulgated by the NCCUSL is the Uniform Reciprocal Enforcement of Support Act (URESA), which has established an interstate system of enforcement and modification of spousal and child support awards. This Court cites favorably to URESA in *Kulko* v. *Superior Court,* 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978).

[4] *New York ex rel Halvey* v. *Halvey,* 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed 1133 (1947); *May* v. *Anderson,* 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953); *Kovacs* v. *Brewer,* 356 U. S. 604, 78 S. Ct. 963,

*(Footnote continued on following page)*

has encouraged independent action on the part of states. The decisions of this Court have, consistently, deferred to individual state power to enforce, refuse enforcement, and modify child custody decrees. This contrasts with this Court's usual rigor in applying Article IV, Section 1 to state court judgments.[5] In three cases, a second state was not required to enforce an original decree because child custody decrees are not final judgments, and are subject to modification under varying state standards.[6] What the state with original jurisdiction may do, another state may do, and full faith and credit bends to the second state's judgment, accordingly. In the case of *May* v. *Anderson,* 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), this Court finds an absolute requirement for personal jurisdiction over the defendant in a child custody dispute before a decree can be binding upon that defendant. This decision was subsequent in time to *International Shoe* v. *Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 45 (1945), in which this Court introduces the concept of minimum contracts between defendant and forum as the standard for taking personal jurisdiction. *May,* however, derives its precedent from earlier cases, *Pennoyer* v. *Neff,* 95 U. S. 741, 24 L. Ed. 565 (1878), *Estin* v. *Estin,* 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (1948), and *Krieger* v. *Krieger,* 334 U. S. 555, 92 L. Ed. 1572 (1948), all pre-minimum contact cases that require personal service upon a defendant to bind him. *May* raises the very real possibility that no decree is fully binding unless all parties are served within a state's boundaries, thereby freeing an enormous number of decrees from the restraints of full faith and credit.

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*(Footnote continued from preceding page)*

2 L. Ed. 2d 1008 (1958); *Ford* v. *Ford,* 371 U. S. 187, 83 S. Ct. 273, 9 L. Ed. 2d 240 (1962).

[5] *Milliken* v. *Meyers,* 311 U. S. 457, 462, 61 S. Ct. 548, 85 L. Ed. 278 (1940); *Williams* v. *North Carolina,* 317 U. S. 287, 294, 295 (1940).

[6] *Halvey, Kovacs,* and *Ford, supra* note 4.

This Court's reluctance to find binding effect, to permit Article IV, Section 1 to apply less firmly than it does for other kinds of judgments, seems, also grounded in a basic policy perception. That paramount perception concerns the relationship of a state to children within its borders, and a state's interest in the welfare of those children.

The most visible expression of this policy concern is found in the concurring opinion of Justice Frankfurter in *May* and in his dissent in *Kovacs* v. *Brewer,* 356 U. S. 604, 78 S. Ct. 963, 2 L. Ed. 2d 1008 (1958). In *May* at page 536, Justice Frankfurter notes:

> Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children . . . Interests of a State other than its duty towards children may also prevail over the interest of national unity that underlies the Full Faith and Credit Clause. But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another state's discharge of its responsibility at another time.

Such considerations seem to have influenced the plurality in *May,* as well. Justice Jackson, in dissent, preceptively recognizes the plurality opinion as a substantial deviation from this Court's usual posture on personal jurisdiction, res judicata and binding effect.[7]

In *Kovacs,* the policy position is, again, articulated, in dissent, by Justice Frankfurter.[8] His dissent does not go to the central issue of the second state's (North Carolina) power to ignore the first state's (New York) decree. He dissents from the majority reliance upon "changed circumstances" as a basis for permitting North Carolina to refuse enforcement of New

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[7] *May, supra* note 4, at pages 537, 538, 539.

[8] *Kovacs, supra* note 4, at pages 611, 612.

York's decree. The majority retains the standard, but in a pallid, weakened form. Careful scrutiny of *Kovacs* indicates that the evidence for changed circumstances was very thin and very confused. Even though thin on the issue, this Court balked at reversing the North Carolina decision outright, and merely remanded for further clarification. Changed circumstances, yes, but not very rigorously applied is the message of *Kovacs.*[9] There is, thus, congruence of a kind between majority and dissent.

In the *Ford* case, this Court devalues further the "changed circumstances" requirement.[10] The first state's (Virginia) judgment was a so-called "dismissed agreed" order in which Virginia accepted a private settlement as a basis for dismissing the action. Although Virginia case law provides that such "dismissed agreed" settlements are res judicata, this Court notes that no case in Virginia concerns child custody, "where the public interest is strong."[11] This Court rejects the notion of res judicata effect for the "dismissed agreed" order, stating that Virginia law puts the interests of the child first. Custody is "so vital to a child's happiness and well being . . . frequently cannot be left to the discretion of the parents."[12] The Virginia decree could then be modified and no reliance upon "changed circumstances" may be found whatever in the decision. The "changed circumstances" rule first announced in *Halvey* comes to nothing. Any taint whatsoever upon the res judicata effect of a judgment topples it. In *Ford,* this Court most strongly fosters individual state autonomy in the enforcement and modification of out-of-state child custody decrees, and uses the state's fundamental interest in children for so doing.

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[9] The standard of "changed circumstances was questioned, also, in *Halvey* in Justice Frankfurter's concurring opinion. *Halvey, supra* note 4, at page 617.

[10] *Ford, supra* note 4.

[11] *Id.* at page 192.

[12] *Id.* at page 193.

A review of past cases and policy is important because of subsequent reliances placed upon them for the resolution of child custody cases. The line of cases beginning with *Halvey* and continuing through *Ford* have been controversial, and strongly criticized. The basis for criticism appears, initially, in the concurring opinion in *Halvey.* Justice Rutledge identifies the unsettling effect that decision would have on children:[13]

> The result seems unfortunate in that apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction between alienated parents. The consequence hardly can be thought conducive to the child's welfare.

Justice Jackson repeats this theme further in his dissent in *May,* a case that is generally regarded as disasterous to the welfare of children by most commentators.[14] The simple fact is that each state's capacity to ignore the enforcement of other state's decrees, and to modify them, created a legal climate favoring forum-shopping, seize and run tactics between custody contestants, and aggravated prolonged litigations. The best estimate of actual cases of child snatching encouraged by this state of the law indicates that between 25,000 and 100,000 cases occurred each year prior to the wide spread adoption of remedial legislation, of which the UCCJA is the most important component.[15]

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[13] *Halvey, supra* note 4, at page 619.

[14] *May, supra* note 4, at page 539. See, also, Ehrenweig, "Interstate Recognition of Custody Decrees", 51 Mich L. Rev. 345 (1953), revised in *Selected Readings on Conflict of Laws* 822 (Culp. Ed. 1956); Ratner, "Child Custody In the Federal System." 62 Mich. L. Rev. 795 (1964); Ehrenzweig, "The Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings," 64 Mich. L. Rev. 1 (1965); Clark, *The Law of Domestic Relations* 323 to 326 (1968); Hazard, "May v. Anderson, Preamble to Family Law Chaos," 45 Va. L. Rev. 379; Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vanderbilt L. Rev. 1207 (1969).

It is possible to sympathize with the motivations of this Court in its interpretations of Article IV, Section 1, as it applies to child custody matters. It seems probable that the entire Court felt its decisions served children better than more rigorous application of full faith and credit might have. In interpreting the Full Faith and Credit Clause, as implemented by Congress in 28 U. S. C. 1738, this Court had little latitude in the application of certain general principles.[16] Congress has a specific power, which it exercised once in the enactment of 28 U. S. C. 1738. This Court could not extend itself beyond the mandate of Congress without seriously abusing the principle of separation of powers. But the adverse effect on children clearly has been established, and must be recognized.

The genius of the federal system lies in its capacity to find a remedy at one level of government, when it cannot be obtained at another. Could the states acting within the scope of their constitutionally permitted powers solve this problem of child custody for themselves? To answer this question, the principle of comity must first be examined.

As to comity between states, this Court said in *Milwaukee County* v. *White,* 296 U. S. 268, 272, 56 S. Ct. 229, 80 L. Ed. 220 (1935), "A state court, in conformity to state policy, may, by comity, give a remedy which full faith and credit does not compel." More recently, this Court said, in *Nevada* v. *Hall,* 440 U. S. 410, 425, 90 S. Ct. 1182, 59 L. Ed. 2d 416:

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[15] Joint Hearing, Subcommittee on Criminal Justice of the Committee on the Judiciary and the Subcommittee on Child and Human Development of the Committee on Labor and Human Resources of the U.S. Senate, *Parental Kidnapping Prevention Act of 1975,* S. 105, U.S. Senate, 96th Congress, at page 10 (January 30, 1980).

[16] The rules have changed, however for cases subject to the Parental Kidnapping Prevention Act, 28 U. S. C. 1738A. This legislation is considered in Sub-D. of the Argument, *infra.*

> Indeed, in view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the framers. [See, also, *Bank of Augusta* v. *Earle,* 13 Peters 519, 590, 10 L. Ed. 274 (1839)]

The states may do what full faith and credit does not compel, and this Court's position has been to presume comity.[17] The UCCJA was created in reliance upon these principles.

The UCCJA creates a system of rules that account for the complexity of the problem. It is meant to prevent interstate child custody disputes, initially, and to resolve those that do occur by establishing enforcement between states, and by regulating modification. Section 3 of the UCCJA provides four bases for taking original or modification jurisdiction over child custody matters.[18] Generally, original jurisdiction may be taken when a state is the home state of the child or when the state has substantial contacts with the child, and at least one other contestant. Once a state with UCCJA jurisdiction initiates a proceeding, Section 6 instructs sister UCCJA states to refrain from proceeding.[19] Once a decree has been entered, Section 13 provides for its enforcement in sister UCCJA states.[20] Section 14 limits modification in sister UCCJA states.[21] Section 14 may be the most critical section in the ent[illegible] act. A state may not modify a decree of another state unle[illegible] "it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this act or has declined to assume jurisdiction to modify . . ."

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[17] *Nevada* v. *Hall,* 440 U. S. 410, 425, 90 S. Ct. 1182, 59 L. Ed 2d 416 (1981).

[18] UCCJA, *supra* note 1.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

The major effect of the UCCJA is simply to protect jurisdiction in the initial forum, thereby eliminating the incentive to continue the dispute across state lines, and to seize and run. If the initial forum's basis for jurisdiction terminates, then only a state with appropriate jurisdiction under Section 3 may proceed to modify. These careful limitations upon modification are the Act's basic protection for children from damaging interstate battles. Coupled with the other provisions of the UCCJA for interstate cooperation between courts, they provide a complete, organic set of rules for the fair adjudication of child custody disputes. The Amici Curiae wish to emphasize the comprehensive character of this Act. Even though this exercise of state power has a different effect than, perhaps, Justice Frankfurter envisioned, the states have done more to solve their problems in the spirit of full faith and credit than any series of decisions by this Court, or any other court, could ever do.

The Amici Curiae, also want to emphasize how much this comprehensive solution, through the exercise of individual state powers, depends upon the child custody decisions of this Court. The enforcement and modification rules of Sections 6, 13, and 14 were drafted with *Halvey, Kovacs,* and *Ford,* as background. *May* was instrumental in the drafting of Sections 3, 5, 12, and 13. The UCCJA depends upon the entire climate favoring individual state autonomy encouraged by this Court. Its scheme of rules now operates between 48 states. Even Congress has now moved to ally full faith and credit with the operation of the UCCJA between states.[22] So long as state courts must decide these kinds of cases, (the Constitution provides Congress no power to legislate substantive child custody law) only something like the UCCJA in conjunction with a federal statute implementing Article IV, Section 1, could ever approach adequacy. It would be greatly ironic now, if this Court found the UCCJA in conflict with Article IV, Section 1 of the Constitution of the United States.

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[22] *Parental Kidnapping Prevention Act, supra* note 16.

### B. The 237th District Court of Lubbock County Texas, did not have jurisdiction to modify the original Louisiana decree, because that court proceeded as a court with original jurisdiction without knowledge of the prior Louisiana decree, and because the children were neither domiciled nor physically present in Texas.

The Amici Curiae urge this Court to continue deferring to individual state autonomy in child custody cases, and to do so in a manner consistent with the broad principles of full faith and credit. For these are reconcilable principles, under the proper alignment of state and federal law. No child custody case before this Court has provided a similar conflict between two states. The first state (Louisiana) took jurisdiction of a child custody matter under its own law, and decreed custody to the mother of the two children.[23] Four months later, the father filed for custody in the second state (Texas).[24] A decree from the Texas court giving custody to the father issued four days more than six months after the first decree.[25] There is no evidence that the Texas court knew about the Louisiana decree, although VTCA Sec. 11.08(1) and 11.071 require disclosure of any court with "continuing jurisdiction" of a child custody matter. VTCA Sec. 11.08 and 11.071 establish the petition requirements for any suit affecting the parent-child relationship in Texas courts. Clearly, Texas courts recognize continuing jurisdiction in the courts of foreign states, and such jurisdiction should be disclosed.[26] At any rate, the Texas court proceeded as if it had original jurisdiction. Having obtained a purportedly original decree, the father now asks that full faith and credit be given to it in Louisiana.[27]

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[23] Petition for a Writ of Certiorari, *Eicke* v. *Eicke*, No. 81-1284, page 39.

[24] *Id.* at page 9.

[25] *Id.* at page 40.

In the prior cases before this Court, the second state confronted the issue of full faith and credit to the first state, and gave or refused it. Here, the second state effectively modified the decree of the first state, without any regard for the existence of the first state's jurisdiction and decree. Having leapt over the question of recognition for the first decree, and in essence having ignored full faith and credit for that decree, the second decree comes before this Court, which is urged to require full faith and credit for it in the first state. In other words, should this Court give preference, in the application of the Full Faith and Credit Clause, to the first judgment, or the second?

The Amici Curiae contend that the second judgment has some defects which bear on this Court's preference. This Court has frequently stated the principle that a judgment is conclusive under Article IV, Section 1 of the Constitution of the United States, only if a state has jurisdiction over the subject matter, and of the parties.[28] A failure of jurisdiction over the person or over the subject matter of a dispute permits a sister state to refuse enforcement of the judgment. In this case, the Texas court asserted jurisdiction over the person under VTCA Sec. 11.051.[29] That is the only section under which jurisdiction is specifically claimed.

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[26] *Seaberg* v. *Brgunier,* 515 S. W. 2d 398 (1974); *Russell* v. *McMurtrey,* 526 S. W. 2d 270 (1975); Sampson, "Jurisdiction in Divorce and Conservatorship suits," 8 Tex. Tech. L. Rev. 159, 178 (1976).

[27] Petition, *supra* note 23, at page 8.

[28] *Williams* v. *North Carolina,* 317 U. S. 287, 297 (1940); *Durfee* v. *Duke,* 375 U. S. 106, 110, 111, 112, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963); *Nevada* v. *Hall, supra* note 17, at page 421.

[29] Petition, *supra* note 23, at page 41.

The Amici Curiae have already discussed the petition requirements of Texas law, which include disclosure of any court with continuing jurisdiction over a suit affecting the parent-child relationship.[30] Texas courts are directed by statute to a number of conclusions upon a finding of continuing jurisdiction in another court. VTCA Sec. 11.053 requires Texas courts to "recognize and enforce an original or modified final decree granted by a court of another state and entered in litigation that would have been a suit affecting the parent-child relationship in this state unless it is shown that the out-of-state court did not exercise jurisdiction under statutory authority substantially in accordance with the jurisdictional prerequisites of this code."

VTCA Sec. 11.071(d) requires Texas courts to withdraw from exercising jurisdiction upon determining that another court has continuing jurisdiction. VTCA Sec. 11.05(e) states: "A voluntary or involuntary dismissal of a suit affecting the parent-child relationship or the entry of a decree by another court having dominant jurisdiction of the suit terminates all jurisdiction of the Court." If the Texas court does not know of continuing jurisdiction in any other court, it cannot satisfactorily determine its own jurisdiction. The petition requirements in VTCA Sec. 11.08 and 11.071 directly go to the capacity of a Texas court to assert jurisdiction, both over the person and the subject matter.

Courts subject to the UCCJA have, ordinarily, been those courts to consider such a petition requirement. Section 9 of the UCCJA requires very substantial disclosure of facts pertaining to a child's past homes, and of any past proceedings pertaining to it. As the Comment to Section 9 notes, "It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of *determining its jurisdiction,* the joinder of parties, and the identification of courts in other states . . ." The requirements of Section 9 have been held mandatory, so that material defects in the petition void the proceeding.[31] There are no Texas cases interpreting VTCA Sec. 11.08 and 11.071 on this specific point.

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[30] See text *infra* between notes 25 and 27.

This Court has not permitted any defect in a judgment as a defense to the application of full faith and credit.[32] However, when the error goes to the very jurisdiction of the court making the judgment, it is a matter of the jurisdiction, itself. And lack of jurisdiction allows a sister state to deny full faith and credit.

There are further defects in the jurisdiction of the Texas court, as well. For a judgment to receive full faith and credit, it must be made with subject matter jurisdiction as well as jurisdiction over the person.[33] VTCA Sec. 11.051 was enacted in 1975 to affect long-arm jurisdiction over parties not residing or present in Texas. By its own terms, it purports only to confer personal jurisdiction. "In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person . . ."

The Texas legislature has provided a statutory standard for subject matter jurisdiction in Texas, VTCA Sec. 11.045. It states, "A court has original jurisdiction of a suit affecting the parent-child relationship, whether or not the child is physically present in the state . . ."

Section 11.045 is limited to "original" jurisdiction by its own terms. The Texas legislature certainly knew the distinction between original and modification jurisdiction. It, also, enacted VTCA Sec 11.053, in which that distinction is carefully made. So the question remains as to jurisdictional requirements for modification of decrees, even after the enactment of 11.045.

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[31] NCCUSL, *supra* note 1; *Pasqualone* v. *Pasqualone,* 406 N. E. 2d 1121, 1124 (1980).

[32] *Milliken* and *Williams, supra* note 5.

[33] Cases, *supra* note 28.

Although the Texas court proceeded as if its jurisdiction was original, its judgment can only be considered a modification of the prior Louisiana judgment. The Louisiana District Court regarded the Texas decision as a modification of the Louisiana decree, and modification is its historical and actual effect.[34] Without any statute pertaining to jurisdiction over modifications of prior decrees, this Court will have to consider prior Texas case law.

What were the jurisdictional tests prior to the enactment of the recent Texas statutes? Prof. Sampson of the University of Texas Law School states:[35]

> Prior to the effective date of the Family Code, it was consistently held that a Texas court had jurisdiction to make a child custody determination only if the child was domiciled in Texas or physically present in the state.

Since there has been no statutory change in this rule for modifications of existing decrees, the rule must still apply to them.

The leading Texas case is *Ex Parte Birmingham,* Sup. Ct. of Tex., 244 S.W. 2d 177 (1952). In considering past Texas precedent, the court said:[36]

> From the two recent decisions last above cited and those to which the opinions therein refer, it is shown that the two basic alternative prerequisites for custody jurisdiction are (a) domicile of the child in the state and (b) its presence in the state.

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[34] Petition, *supra* note 23, at page 37. Texas has not defined modification. Louisiana follows the UCCJA definition: "a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court." L. R. S. 13:1702 (7).

[35] Sampson, *supra* note 26, at pages 172, 173.

[36] *Ex Parte Birmingham,* Sup. Ct. of Tex., 244 S. W. 2d 977, 979 (1952).

*Sampsell* v. *Superior Ct.*, 32 Cal. 2d 763, 197 P.2d 739 (1948), is considered in the *Birmingham* opinion.[37] *Sampsell* is the leading pre-UCCJA case in the U.S. It is the basis for the *Restatement, Conflict of Laws 2d,* Sec. 79, and it adds a third principle to the two principles of domicile and presence of the child. In *Sampsell,* jurisdiction over the parents is sufficient, even without the presence or domicile of the child.[38] But the Texas Supreme Court in *Birmingham,* rejects the *Sampsell* rule, "But as applicable to a situation like that before us, the rule denying jurisdiction of the forum in which the child is neither present nor domiciled seems preferable."[39] Presence of the child or domicile in Texas are absolute requirements in *Birmingham.*

VTCA Sec. 11.045 may have broadened the common law rule in Texas for original decrees, but *Birmingham* would seem wholly valid for modification decrees. See *Ponder* v. *Perry* Tex Civ App, 604 S.W.2d 406 (1980) and *Thornlow* v. *Thornlow* Tex Civ App, 576 S.W.2d 697 (1979), as well. In the case at bar, the mother and children moved to Louisiana.[40] At no time has it been claimed that they are domiciliaries of Texas, or physically present in Texas. Indeed, the initial Louisiana decree should establish their domicile in Louisiana, conclusively.[41] Without domicile or physical presence in Texas, there can be no subject matter jurisdiction in the Texas court, and its judgment is not entitled to full faith and credit.

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[37] *Id.* at page 980.

[38] *Sampsell* v. *Sup. Ct.*, 32 Cal. 2d 763, 197 P. 2d 739 (1948).

[39] *Birmingham, supra* note 36, at page 980.

[40] Petition, *supra* note 23, at page 9.

[41] The general rule is, "A minor has the same domicil as the parent with whom he lives. *Restatement, Conflict of Laws 2d,* Sec. 22 (1).

### C. The Judgment of the 237th District Court of Lubbock County Texas, is not entitled to full faith and credit in Louisiana because strong public policy in Louisiana, grounded both in the welfare of children and the need for uniformity between the states in conformity to the broad principles of full faith and credit, permit Louisiana to refuse enforcement of the Texas judgment.

This Court has shown a consistent reluctance for curbing individual state autonomy in the adjudication of disputes concerning children within a state's borders.[42] This reluctance is contrary to its usual position with respect to the application of Article IV, Section 1 of the Constitution of the United States.[43]

Yet, this Court has found in certain choice of law cases, a public policy exception to full faith and credit. And in these cases, it has offered the opportunity to treat judgments in a similar fashion. In *Nevada* v. *Hall*, at page 422, this Court acknowledges that Article IV, Section 1 of the *Constitution* does not require a state "to enforce even the judgment of another state if it would violate its own policies or statutes." In *Pink* v. *A.A.A. Highway Express*, 314 U. S. 201, 210 (1941), this Court notes:

> But the full faith and credit clause is not an inexorable and unqualified command. It leaves some scope of state control within its borders of affairs which are peculiarly its own. This Court has often recognized that, consistently with the appropriate application of the full faith and credit clause, there are limits to the extent to which the laws and policy of one state may be subordinated to those of another.

See also, *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 501-504, 59 S. Ct. 629, 83 L. Ed. 940 (1938), and *Alaska Packers Assn.* v. *Calif.*, 294 U. S. 532, 546, 55 S. Ct. 518, 79 L. Ed. 1044 (1934).

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[42] Cases *supra* note 4.

[43] Cases, *supra* note 28.

In the present case, Louisiana has invoked its own statutory authority and refused full faith and credit to a Texas decree. In the Court of the Twenty Eighth Judicial District, it relies upon two provisions, both from the UCCJA. L. R. S. 13:1711 "provides that the parties are bound by custody decrees rendered in Louisiana Courts until such decrees are modified by a court functioning within the jurisdictional guidelines of the UCCJA," and L. R. S. 13:1712 "requires the Courts of Louisiana to enforce initial or modification decrees of courts of the other States, if they assumed jurisdiction under statutory provisions substantially similar to the UCCJA, which was not done in the case."[44]

The Third Circuit Court of Appeal refers to L. S. A.-R. S. 13:1705, which establishes priority between courts with conflicting jurisdiction, and again, L. S. A.-R. S. 13-1712.[45] It emphasizes the Texas court's total disregard for the Louisiana decree, and notes: "Therefore, the Texas custody decree was not rendered substantially in accordance with the provisions of the Uniform Law and need not necessarily be recognized by the Courts of Louisiana."[46]

The Amici Curiae urge this Court to except the Louisiana courts in this case from the absolute requirement of full faith and credit. We believe certain policy grounds exist for such an exception. First, of course, is the unique relationship between the state and those children found within its borders. Concern for these children is an elemental part of Louisiana policy:[47]

> In an age of fluid population trends many cases are presented in which jurisdiction may be concurrent in several states. In order to provide some stability to reasoned custody decrees by discouraging relitigation, to deter custody determinations by physical abduction, to

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[44] Petition, *supra* note 23, at page 37.

[45] *Id.* at pages 44, 45, 46.

[46] *Id.* at page 47.

[47] *Id.* at page 43.

> avoid jurisdictional competition and conflicting custody decrees in several states, and primarily to attain the security of home environment necessary for the child's well being, the National Conference of Commissioners proposed the uniform law adopted in Louisiana by Act 513 of 1978.

Louisiana has adopted this act to further the best interests of its children, and its children are a matter "peculiarly its own." As this Court has repeated, a state has no interest greater than its interest in the marital relationships of its citizens, and in its children.[48]

But this interest, alone, may not be sufficient to compel a rare public policy exception to the unswerving application of Article IV, Section 1. The Amici Curiae urge this Court to scrutinize very carefully the connection between this concern for children and the underlying spirit of Article IV, Section 1. As this Court affirms in *Nevada* v. *Hall,* at page 425, the Constitution implies a Union in which states are not free to treat each other as unfriendly sovereigns. This Court points out in *Milwaukee County* v. *White,* at pages 276, 277:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under laws or by the judicial proceedings of others, and to make them integral parts of a single nation . . .

The essence of full faith and credit is union, and the orderly conduct of relations between the many states.

It is appropriate to point out that the Third Circuit Court dwells upon the cooperative aspects of the UCCJA, as adopted in Louisiana. If the Texas court had been subject to similar provisions, it would have discovered the prior Louisiana decree.[49] It could have informed the Louisiana courts of the institution of custody proceedings in Texas, and "in general, should have cooperated with the Louisiana court in determining the most convenient forum for gathering evidence and the court best suited to decide the custody dispute."[50] It is Texas that ignored the existence of a properly adjudicated judgment of a sister state. And it is Louisiana law that promotes cooperation fully.

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[48] *May supra* note 4, at page 536; *Williams, supra* note 28, at page 298.

The Amici Curiae do not ask this Court to give a blanket exception to the Full Faith and Credit Clause for states adopting the UCCJA as against those few remaining states that have not, in every case of conflict. What we ask has a very narrow, simple, and universal construction, that marries the state's interest in children with principles of full faith and credit. When one state acts properly in the exercise of its own jurisdiction in a child custody matter, and a second state without regard for the fact or possibility of the first state's decree, adjudicates the identical matter, the first state should be able to stand upon its initial judgment when asked to recognize and enforce the second decree. It does not matter necessarily what the law is in either state, although this Court should strongly favor the actions and law most consistent with the underlying principles of full faith and credit. It does not matter at whose feet the blame for the conflict may be laid, at the foot of the second state itself, or at the foot of a party to the second action for failure to reveal the first proceeding or decree. What makes such a rule compelling is the simple fact that the action of the second state, automatically, introduces extreme uncertainty into the lives of children subject to both decrees. While doing that, it, automatically, invites continued unrest among the contestants, and violates the spirit of Article IV, Section 1. Where children are clearly subject to the jurisdiction of the first state, it should be able to preserve their stability in the face of any other uncertainty.

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[49] Petition, *supra* note 23, at page 46, 47.

[50] *Ibid.*

Any other decision by this Court will put children in jeopardy of succeeding, see-saw proceedings, once again. If Texas prevails, parties will strive to relitigate to obtain the "second" judgment. They will be encouraged to conceal prior proceedings and decrees. To prefer Texas is to legitimize the last bite, and in many disputes there never is and never will be a last bite, as contestants migrate from state to state. This Court should prefer full faith and credit for the first decree, to protect it as the UCCJA does.[51] All that this rule amounts to is full faith and credit for the first decree.[52]

### D. The Louisiana courts proceeded in this case after December 28, 1980, the effective date of the Parental Kidnapping Prevention Act (PKPA), 28 U. S. C. 1738A, and the PKPA should apply to this case, and would permit Louisiana to refuse enforcement of the Texas judgment.

On December 28, 1980, the Parental Kidnapping Prevention Act (PKPA), 28 U. S. C. 1738A went into effect upon the signature of the President of the United States. It took effect as this case was on appeal from the Twenty-Eighth Judicial District Court, State of Louisiana, La Salle Parish, to the Court of Appeal, Third Circuit, State of Louisiana. The District Court entered its decision on September 2, 1980, before enactment of the PKPA.[53] But the Third Circuit Court of Appeal rendered its decision on July 8, 1981, and the denial of

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[52] *We distinguish Treines* v. *Sunshine Mining Co.*, 308 U. S. 66 (1939), and *Sutton* v. *Leib*, 342 U. S. 402 (1951). In both these cases, the second state considered and rejected the validity of the jurisdiction of the first state reaching a judgment. Here the second state, Texas, did not consider the jurisdiction of the first state, Louisiana, at all.

[53] Petition, *supra* note 23, at page 38.

Certiorari by the Supreme Court of the State of Louisiana occurred October 9, 1981.[54]

The Amici Curiae urge this Court to apply the PKPA to this case. Clearly, this case was a pending proceeding when the PKPA was enacted. The only issue between them in the Louisiana courts was a question of Article IV, Section 1 and its implementation by acts of Congress, and that issue could not be fully and finally determined by the courts of Louisiana until a decision by the Supreme Court of the State of Louisiana. The PKPA changes no other issue of fact, evidence, procedure, or state law determined between them in prior litigation.

Since full faith and credit is the only issue between them, they cannot argue that they are exempt when Congress exercises its unquestionable power to "by general laws prescribe the manner in which such act, records and proceedings shall be proved, and the effect thereof."[55] No state by its proceedings can alter or resist that specific power. When it is exercised, the decisions of state courts must be subject to it, even as to cases being considered on the effective date of the exercise of that power.

Acts of Congress which regulate the proceedings of state courts directly are rare. Only Article IV, Section 1 provides such an immediate, express power, and Congress has acted pursuant to it only on one other occasion. So this Court has not had to review cases of retroactive effect or the effect on pending proceedings of congressional acts pursuant to Article IV, Section 1 before this time. When it has reviewed acts of Congress empowering courts to determine certain cases, it has found retroactive effect, even when rights have been adjudicated under prior law.

In *Sampeyreac* v. *U. S.*, 32 U. S. 22, 7 Pet. 222 (1833), title to certain lands in the Territory of Arkansas was adjudicated under an earlier act of Congress. A subsequent act of Congress extended the period during which such actions could be considered.[56] The U. S. proceeded against Sampeyreac and successors for fraudulent land claims, even though the title had been fully determined in a proceeding under the prior act of Congress.[57] This Court permits the second action, giving the second act of Congress retrospective effect.[58]

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[54] *Id.* at pages 54, 55.

[55] Article IV, Section 1, *Constitution of the United States.*

The parties to this action are caught in a similar way between 28 U. S. C. 1738 and 28 U. S. C. 1738A. In 28 U. S. C. 1738A, Congress has dealt with the question of full faith and credit for child custody decrees specifically. There is nothing ventured in 28 U. S. C. 1738A that could not have been done by state law under principles of comity, and the continuing rule of Article IV, Section 1 and 28 U. S. C. 1738. Indeed, the Louisiana enactment of the UCCJA mirrors the text of 28 U. S. C. 1738A, since the PKPA quite clearly clarifies child custody disputes in much the same way as the UCCJA does. Given that the PKPA represents the most recent expression of the specific power of Congress to implement Article IV, Section 1 and that this was a pending decision in the Louisiana courts when the PKPA was enacted, this Court should permit its application to this case. The Amici Curiae recommend that this Court remand for further findings pursuant to the PKPA.

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[56] *Sampeyreac* v. *U.S.*, 32 U. S. 222, 223, 7 Pet. 222 (1833).
[57] *Id.* at 233.
[58] *Id.* at 235.

## CONCLUSION

For the above cited reasons, the Amici Curiae urge this Court to affirm the decisions of the Louisiana courts. In this way, it will afford full faith and credit to the vast majority of decrees in the United States.

Respectfully submitted,

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# UNIFORM CHILD CUSTODY JURISDICTION ACT

*Drafted by the*

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

*and by it*

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

*at its*

ANNUAL CONFERENCE
MEETING IN ITS SEVENTY-SEVENTH YEAR
AT PHILADELPHIA, PENNSYLVANIA
JULY 22-AUGUST 1, 1968

WITH
PREFATORY NOTE AND COMMENTS

APPROVED BY THE AMERICAN BAR ASSOCIATION AT ITS
MEETING AT PHILADELPHIA, PENNSYLVANIA
August 7, 1968

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# UNIFORM CHILD CUSTODY JURISDICTION ACT

## PREFATORY NOTE

There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. Children of separated parents may live with their mother, for example, but one day the father snatches them and brings them to another state where he petitions a court to award him custody while the mother starts custody proceedings in her state; or in the case of illness of the mother the children may be cared for by grandparents in a third state, and all three parties may fight over the right to keep the children in several states. These and many similar situations constantly arise in our mobile society where family members often are scattered all over the United States and at times over other countries. A young child may have been moved to another state repeatedly before the case goes to court. When a decree has been rendered awarding custody to one of the parties, this is by no means the end of the child's migrations. It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody. The party deprived of the child may then resort to similar tactics to recover the child and this "game" may continue for years, with the child thrown back and forth from state to state, never coming to rest in one single home and in one community.

The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child who has never been given the chance to develop a sense of belonging and whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life, to his own lasting detriment and the detriment of society.

This unfortunate state of affairs has been aided and facilitated rather than discouraged by the law. There is no statutory law in this area and the judicial law is so unsettled that it seems to offer nothing but a "quicksand foundation" to stand on. See Leflar, American Conflicts

Law 585 (1968). See also Clark, Domestic Relations 320 (1968). There is no certainty as to which state has jurisdiction when persons seeking custody of a child approach the courts of several states simultaneously or successively. There is no certainty as to whether a custody decree rendered in one state is entitled to recognition and enforcement in another; nor as to when one state may alter a custody decree of a sister state.

The judicial trend has been toward permitting custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and family was with the particular state, with little regard to any conflict of law rules. See Leflar, American Conflicts Law 585-6 (1968) and Leflar, 1967 Annual Survey of American Law, Conflict of Laws 26 (1968). Also, since the United States Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees, many states have felt free to modify custody decrees of sister states almost at random although the theory usually is that there has been a change of circumstances requiring a custody award to a different person. Compare *People ex rel. Halvey v. Halvey*, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); and see Comment, Ford v. Ford: Full Faith and Credit To Child Custody Decrees? 73 Yale L. J. 134 (1963). Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. Compare Clark, Domestic Relations 326 (1968).

Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. See *Stout v. Pate*, 209 Ga. 786, 75 S.E. 2d 748 (1953) and *Stout v. Pate*, 120 Cal. App. 2d 699, 261 P. 2d 788 (1953), cert. denied in both cases 347 U.S. 968, 74 S. Ct. 744, 776, 98 L. Ed. 1109, 1110 (1954); *Moniz v. Moniz*, 142 Cal. App. 2d 527, 298 P. 2d 710 (1956); and *Sharpe v. Sharpe*, 77 Ill. App. 2d 295, 222 N.E. 2d 340 (1966). In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. See *Com. ex rel. Thomas v. Gillard*, 203 Pa. Super. 95, 198 A 2d 377 (1964); *In Re Guardianship of Rodgers*, 100 Ariz. 269, 413 P. 2d 774 (1966); *Berlin v. Berlin*, 239 Md. 52, 210 A. 2d 380 (1965); *Berlin v. Berlin*, 21 N.Y. 2d 371, 235 N.E.

2d 109 (1967), cert. denied 37 L.W. 3123 (1968); and *Batchelor v. Fulcher*, 415 S.W. 2d 828 (Ky. 1967).

In this confused legal situation the person who has possession of the child has an enormous tactical advantage. Physical presence of the child opens the doors of many courts to the petitions and often assures him of a decision in his favor. It is not surprising then that custody claimants tend to take the law into their own hands, that they resort to self-help in the form of child stealing, kidnapping, or various other schemes to gain possession of the child. The irony is that persons who are good, law-abiding citizens are often driven into these tactics against their inclinations; and that lawyers who are reluctant to advise the use of maneuver of doubtful legality may place their clients at a decided disadvantage.

To remedy this intolerable state of affairs where self-help and the rule of "seize-and-run" prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964); Ratner, Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183 (1965); and Ehrenzweig, The Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1 (1965). In drafting this Act, the National Conference of Commissioners has drawn heavily on the work of these authors and has consulted with other leading authorities in the field. The American Bar Association has taken an active part in furthering the project.

The Act is designed to bring some semblence of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14. Access to a court may be denied to petitioners who have engaged in child snatching or similar practices. See Section 8. Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases.

The Act stresses the importance of the personal appearance before the court of non-residents who claim custody, and of the child himself, and provides for the payment of travel expenses for this purpose. See Section 11. Further provisions insure that the judge receives necessary out-of-state information with the assistance of courts in other states. See Sections 17 through 22.

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important *which* court exercises jurisdiction but that courts of the several states involved act in partnership to bring about the best possible solution for a child's future.

The Act is not a reciprocal law. It can be put into full operation by each individual state regardless of enactment of other states. But its full benefits will not be reaped until a large number of states have enacted it, and until the courts, perhaps aided by regional or national conferences, have come to develop a new, truly "inter-state" approach to child custody litigation. The general policies of the Act and some of its specific provisions apply to international custody cases.

**SECTION 1.** [*Purposes of Act; Contruction of Provisions.*]

(a) The general purposes of this Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

### COMMENT

Because this uniform law breaks new ground not previously covered by legislation, its purposes are stated in some detail. Each section must be read and applied with these purposes in mind.

SECTION 2. [*Definitions.*] As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) "initial decree" means the first custody decree concerning a particular child;

(7) "modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "physical custody" means actual possession and control of a child;

(9) "person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(10) "state" means any state, territory, or possession of the United States, the Commonweath of Puerto Rico, and the District of Columbia.

### COMMENT

Subsection (3) indicates that "custody proceeding" is to be understood in a broad sense. The term covers habeas corpus actions, guardianship petitions, and other proceedings available under general state law to determine custody. See Clark, Domestic Relations 576-582 (1968).

Other definitions are explained, if necessary, in the comments to the sections which use the terms defined.

**SECTION 3.** [*Jurisdiction.*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

### COMMENT

Paragraphs (1) and (2) of subsection (a) establish the two major bases for jurisdiction. In the first place, a court in the child's home state has jurisdiction, and secondly, if there is no home state or the child and his family have equal or stronger ties with another state, a court in that state has jurisdiction. If this alternative test produces concurrent jurisdiction in more than one state, the mechanisms provided in sections 6 and 7 are used to assure that only one state makes the custody decision.

"Home state" is defined in section 2(5). A 6-month period has been selected in order to have a definite and certain test which is at the same time based on a reasonable assumption of fact. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 818 (1964) who explains:

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

Subparagraph (ii) of paragraph (1) extends the home state rule for an additional six-month period in order to permit suit in the home state after the child's departure. The main objective is to protect a parent who has been left by his spouse taking the child along. The provision makes clear that the stay-at-home parent, if he acts promptly, may start proceedings in his own state if he desires, without the necessity of attempting to base jurisdiction on paragraph (2). This changes the law in those states which required presence of the child as a condition for jurisdiction and consequently forced the person left behind to follow the departed person to another state, perhaps to several states in succession. See also subsection (c).

Paragraph (2) comes into play either when the home state test cannot be met or as an alternative to that test. The first situation arises, for example, when a family has moved frequently and there is no state where the child has lived for 6 months prior to suit, or if the child has recently been removed from his home state and the person who was left behind has also moved away. See paragraph (1), last clause. A typical example of alternative jurisdiction is the case in which the stay-at-home parent chooses to follow the departed spouse to state 2 (where the child has lived for several months with the other parent) and starts proceedings there. Whether the departed parent also has access to a court in state 2, depends on the strength of the family ties in that state and on the applicability of the clean hands provision of section 8. If state 2, for example, was the state of the matrimonial home where the entire family lived for two years before moving to the "home state" for 6 months, and the wife returned to state 2 with the child with the consent of the husband, state 2 might well have jurisdiction upon petition of the wife. The same may be true if the wife returned to her parents in her former home state where the child had spent several months every year before. Compare Willmore v. Willmore, 273, Minn. 537, 143 N.W. 2d 630 (1966), cert. denied 385 U.S. 898 (1966). While jurisdiction may exist in two states in these instances, it will not be *exercised* in both states. See sections 6 and 7.

Paragraph (2) of subsection (a) is supplemented by subsection (b) which is designed to discourage unilateral removal of children to other states and to guard generally against too liberal an interpretation of paragraph (2). Short-term presence in the state is not enough even though there may be an intent to stay longer, perhaps an intent to establish a technical "domicile" for divorce or other purposes.

Paragraph (2) perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislative purposes expressed in section 1. The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state. The submission of the parties to a forum, perhaps for purposes of divorce, is not sufficient without additional factors establishing closer ties with the state. Divorce jurisdiction does not necessarily include custody jurisdiction. See Clark, Domestic Relations 578 (1968).

Paragraph (3) of subsection (a) retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume when a child is in a situation requiring immediate protection. This jurisdiction exists when a child has been abandoned and in emergency cases of child neglect. Presence of the child in the state is the only prerequisite. This extraordinary jurisdiction is reserved for extraordinary circumstances. See Application of Lang, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959). When there is child neglect without emergency or abandonment, jurisdiction cannot be based on this paragraph.

Paragraph (4) of subsection (a) provides a final basis for jurisdiction which is subsidiary in nature. It is to be resorted to only if no other state could, or would, assume jurisdiction under the other criteria of this section.

Subsection (c) makes it clear that presence of the child is not a jurisdictional requirement. Subseqent sections are designed to assure the appearance of the child before the court.

This section governs jurisdiction to make an initial decree as well as a modification decree. Both terms are defined in section 2. Jurisdiction to modify an initial or modification decree of another state is subject to additional restrictions contained in sections 8(b) and 14(a).

SECTION 4. [*Notice and Opportunity to be Heard.*] Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

### COMMENT

This section lists the persons who must be notified and given an opportunity to be heard to satisfy due process requirements. As to persons in the forum state, the general law of the state applies; others are notified in accordance with section 5. Strict compliance with sections 4 and 5 is essential for the validity of a custody decree within the state and its recognition and enforcement in other states under sections 12, 13, and 15. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft sec. 69 (1967); and compare Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

SECTION 5. [*Notice to Persons Outside this State; Submission to Jurisdiction.*]

(a) Notice required for the exercise of jurisdiction over a person outside this State shall be given in a manner reasonably calculated to give actual notice, and may be:

(1) by personal delivery outside this State in the manner prescribed for service of process within this State;

(2) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(3) by any form of mail addressed to the person to be served and requesting a receipt; or

(4) as directed by the court [including publication, if other means of notification are ineffective].

(b) Notice under this section shall be served, mailed, or delivered, [or last published] at least [10, 20] days before any hearing in this State.

(c) Proof of service outside this State may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this State, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(d) Notice is not required if a person submits to the jurisdiction of the court.

### Comment

Section 2.01 of the Uniform Interstate and International Procedure Act has been followed to a large extent. See 9B U.L.A. 315 (1966). If at all possible, actual notice should be received by the affected persons; but efforts to impart notice in a manner reasonably calculated to give actual notice are sufficient when a person who may perhaps conceal his whereabouts, cannot be reached. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and Schroeder v. City of New York, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962).

Notice by publication in lieu of other means of notification is not included because of its doubtful constitutionality. See Mullane v. Central Hanover Bank and Trust Co., *supra;* and see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court Rev. 241, 277, 286-87. Paragraph (4) of subsection (a) lists notice by publication in brackets for the benefit of those states which desire to use published notices *in addition to* the modes of notification provided in this section when these modes prove ineffective to impart actual notice.

The provisions of this section, and paragraphs (2) and (4) of subsection (a) in particular, are subject to the caveat that notice and opportunity to be heard must always meet due process requirements as they exist at the time of the proceeding.

### Section 6. [*Simultaneous Proceedings in Other States.*]

(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(b) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under section 9 and shall consult the child custody registry established under section 16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(c) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with sections 19 through 22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

### COMMENT

Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods. Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together.

When the courts of more than one state have jurisdiction under sections 3 or 14, priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 may result in the handling of the case by the other court.

While jurisdiction need not be yielded under subsection (a) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances. See subsection (3) and section 7.

Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14.

### SECTION 7. [*Inconvenient Forum.*]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(b) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum which is no less appropriate; and

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

(d) Before determing whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(e) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(f) The court may decline to exercise its jurisdiction under this Act if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(g) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this State, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(h) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, of if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(i) Any communication received from another state informing this State of a finding of inconvenient forum because a court of this State is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this State shall inform the original court of this fact.

### Comment

The purpose of this provision is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once the test of sections 3 or 14 has been met.

The section is a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody cases. The terminology used follows section 84 of the Restatement of the Law Second, Conflict of Laws, Proposed Official Draft (1967). Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme which is limited to child custody cases.

Like section 6, this section stresses interstate judicial communication and cooperation. When there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved.

Paragraphs (1) through (5) of subsection (c) specify some, but not all, considerations which enter into a court determination of inconvenient forum. Factors customarily listed for purposes of the general principle of the inconvenient forum (such as convenience of the parties and hardship to the defendant) are also pertinent, but may under the circumstances be of secondary importance because the child who is not a party is the central figure in the proceedings.

Part of subsection (e) is derived from Wis. Stat. Ann., sec. 262.19 (1).

Subsection (f) makes it clear that a court may divide a case, that is, dismiss part of it and retain the rest. See section 1.05 of the Uniform Interstate and International Procedure Act. When the custody issue comes up in a divorce proceeding, courts may have frequent occasion to decline jurisdiction as to that issue (assuming that custody jurisdiction exists under sections 3 or 14).

Subsection (g) is an adaptation of Wis. Stat. Ann., sec. 262.20 Its purpose is to serve as a deterrent against "frivolous jurisdiction claims," as G.W. Foster states in the Revision Notes to the Wisconsin provision. It applies when the forum chosen is seriously inappropriate considering the jurisdictional requirements of the Act.

SECTION 8. [*Jurisdiction Declined by Reason of Conduct.*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

### Comment

This section incorporates the "clean hands doctrine," so named by Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Rev. 345 (1953). Under this doctrine courts refuse to assume jurisdiction to reexamine an out-of-state custody decree when the petitioner has abducted the child or has engaged in some other objectionable scheme to gain or retain physical custody of the child in violation of the decree. See Fain, Custody of Children, The California Family Lawyer I, 539, 546 (1961); Ex Parte Mullins, 26 Wash. 2d 419, 174 P. 2d 790 (1946); Crocker v. Crocker, 122 Colo. 49, 219 P. 2d 311 (1950); and Leathers v. Leathers, 162 Cal. App. 2d 768, 328 P. 2d 853 (1958). But when adherence to this rule would lead to punishment of the parent at the expense of the wellbeing of the child, it is often not applied. See Smith v. Smith, 135 Cal. App. 2d 100, 286 P. 2d 1009 (1955) and In re Guardianship of Rodgers, 100 Ariz. 269, 413 P. 2d 744 (1966).

Subsection (a) extends the clean hands principle to cases in which a custody decree has not yet been rendered in any state. For example, if upon a de facto separation the wife returned to her own home with the children without objection by her husband and lived there for two years without hearing from him, and the husband without warning forcibly removes the children one night and brings them to another state, a court in that state although it has jurisdiction after 6 months may decline to hear the huband's custody petition. "Wrongfully" taking under this subsection does not mean that a "right" has been violated-both husband and wife as a rule have a right to custody until a court determination is made-but that one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to its jurisdiction.

Subsection (b) does not come into operation unless the court has power under section 14 to modify the custody decree of another state. It is a codification of the clean hands rule, except that it differentiates between (1) a taking or retention of the child and (2) other violations of custody decrees. In the case of illegal removal or retention refusal of jursdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct. Compare Smith v. Smith and In Re Guardianship of Rodgers, *supra;* and see In Re Walter, 228 Cal. App. 2d 217, 39 Cal. Rpts. 243 (1964) where the court assumed jurisdiction after both parents had been guilty of misconduct. The qualifying word "improperly" is added to exclude cases in which a child is withheld because of illness or other emergency or in which there are other special justifying circumstances.

The most common violation of the second category is the removal of the child from the state by the parent who has the right to custody, thereby frustrating the exercise of visitation rights of the other parent. The second sentence of subsection

(b) makes refusal of jurisdiction entirely discretionary in this situation because it depends on the circumstances whether non-compliance with the court order is serious enough to warrant the drastic sanction of denial of jurisdiction.

Subsection (c) adds a financial deterrent to child stealing and similar reprehensible conduct.

SECTION 9. [*Information under Oath to be Submitted to the Court.*]

(a) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath whether:

(1) he has participated (as a party, witness, or in any other capacity) in any other litigation concerning the custody of the same child in this or any other state;

(2) he has information of any custody proceeding concerning the child pending in a court of this or any other state; and

(3) he knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(b) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(c) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

COMMENT

It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various provisions of the Act. Information as to custody litigation and other pertinent facts occurring in other countries may also be elicited under this section in combination with section 23.

SECTION 10. [*Additional Parties.*] If the court learns from information furnished by the parties pursuant to section 9 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this State he shall be served with process or otherwise notified in accordance with section 5.

COMMENT

The purpose of this section is to prevent re-litigations of the custody issue when these would be for the benefit of third claimants rather than the child. If the immediate controversy, for example, is between the parents, but relatives inside or outside the state also claim custody or have physical custody which may lead to a future claim to the child, they must be brought into the proceedings. The courts are given an active role here as under other sections of the Act to seek out the necessary information from formal or informal sources.

SECTION 11. [*Appearance of Parties and the Child.*]

[(a) The court may order any party to the proceeding who is in this State to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child.]

(b) If a party to the proceeding whose presence is desired by the court is outside this State with or without the child the court may order that the notice given under section 5 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(c) If a party to the proceeding who is outside this State is directed to appear under subsection (b) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.

COMMENT

Since a custody proceeding is concerned with the past and future care of the child by one of the parties, it is of vital importance in most cases that the judge has an opportunity to see and hear the contestants and the child. Subsection (a) authorizes the court to order the appearance of these persons if they are in the state. It is placed in brackets because states which have such a provision—not only in their juvenile court laws—may wish to omit it. Subsection (b) relates to the appearance of persons who are outside the state and provides one method of bringing them before the court; sections 19(b) and 20(b) provide another. Subsection (c) helps to finance travel to the court which may be close to one of the parties and distant from another; it may be used to equalize the expense if this is appropriate under the circumstances.

SECTION 12. [*Binding Force and Res Judicata Effect of Custody Decree.*] A custody decree rendered by a court of this State which had jurisdiction under section 3 binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.

### COMMENT

This section deals with the intra-state validity of custody decrees which provides the basis for their interstate recognition and enforcement. The two prerequisites are (1) jurisdiction under section 3 of this Act and (2) strict compliance with due process mandates of notice and opportunity to be heard. There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions (see section 2(2) *supra*), are proceedings in rem or proceedings affecting status. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 69 and 79 (1967); and James, Civil Procedure 613 (1965). For a different theory reaching the same result, see Hazard, A General Theory of State-Court Jurisdiction, 1965 Supreme Court Review 241. The section is not at variance with May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953), which relates to interstate recognition rather than in-state validity of custody decrees. See Ehrenzweig and Louisell, Jurisdiction in a Nutshell 76 (2d ed. 1968); and compare Reese, Full Faith and Credit to Foreign Equity Decrees, 42 Iowa L. Rev. 183, 195 (1957). On May v. Anderson, *supra*, see comment to section 13.

Since a custody decree is nomally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967).

SECTION 13. [*Recognition of Out-of-State Custody Decrees.*] The courts of this State shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.

### COMMENT

This section and sections 14 and 15 are the key provisions which guarantee a great measure of security and stability of environment to the "interstate child" by discouraging relitigations in other states. See Section 1, and see Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 828 (1964).

Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967), and see the Prefatory Note, *supra*. This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the prior decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of the case if this Act had been the law in the state. Compare Comment, Ford v. Ford: Full Faith and Credit to Child Custody Decrees? 73 Yale L.J. 134, 148 (1963).

"Jurisdiction" or "jurisdictional standards" under this section refers to the requirements of section 3 in the case of initial decrees and to the requirements of sections 3 and 14 in the case of modification decrees. The section leaves open the possibility of discretionary recognition of custody decrees of other states beyond the enumerated situations of mandatory acceptance. For the recognition of custody decrees of other nations, see section 23.

Recognition is accorded to a decree which is valid and binding under section 12. This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and given enough time to appear in the proceedings. Personal jurisdiction over the father is not required. See comment to section 12. This is in accord with a common interpretation of the inconclusive decision in May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953). See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 79 and comment thereto, p. 298 (1967). Under this interpretation a state is permitted to recognize a custody decree of another state regardless of lack of personal jurisdiction, as long as due process requirements of notice and opportunity to be heard have been met. See Justice Frankfurter's concurring opinion in May v. Anderson; and compare Clark, Domestic Relations 323-26 (1968), Goodrich, Conflict of Laws 274 (4th ed. by Scoles, 1964); Stumberg, Principles of Conflict of Laws 325 (3rd ed. 1963); and Comment, The Puzzle of Jurisdiction in Child Custody Actions, 38 U. Colo. L. Rev. 541 (1966). The Act emphasizes the need for the personal appearance of the contestants rather than any technical requirement for personal jurisdiction.

The mandate of this section could cause problems if the prior decree is a punitive or disciplinary measure. See Ehrenzweig, Inter-state Recognition of Custody Decrees, 51 Mich. L. Rev. 345, 370 (1953). If, for example, a court grants custody to the mother and after 5 years' of continuous life with the mother the child is awarded to the father by the same court for the sole reason that the mother who had moved to another state upon remarriage had not lived up to the visitation requirements of the decree, courts in other states may be reluctant to recognize the changed decree. See Berlin v. Berlin, 21 N.Y. 2d 371, 235 N.E. 2d 109 (1967); and Stout v. Pate, 120 Cal. App. 2d 699, 261 P. 2d 788 (1953); Compare Moniz v. Moniz, 142 Cal. App. 2d 527, 298 P. 2d 710 (1956). Disciplinary decrees of this type can be avoided under this Act by enforcing the visitation provisions of the decree directly in another state. See Section 15. If the original plan for visitation does not fit the new conditions, a petition for modification of the visiting arrangements would be filed in a court which has jurisdiction, that is, in many cases the original court. See section 14.

Section 14. [*Modification of Custody Decree of Another State.*]
(a) If a court of another state has made a custody decree, a

court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

### COMMENT

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. See People ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947). In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere. Compare Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 821-2(1964).

For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6-1/2 months (3-1/2 months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the "home state" of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. See Clark, Domestic Relations 322-23 (1968). Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease. Compare Brengle v. Hurst, 408 S. W. 2d 418 (Ky. 1966). The situation would be different if the children had been abducted and their whereabouts could not be discovered by the legal custodian for several years. The abductor would be denied access to the court of another state under section 8(b) and state 1 would have modification jurisdiction in any event under section 3(a) (4). Compare Crocker v. Crocker, 122 Colo. 49, 219 P. 2d 311 (1950).

The prior court has jurisdiction to modify under this section even though its original assumption of jurisdiction did not meet the standards of this Act, as long as it would have jurisdiction *now*, that is, at the time of the petition for modification.

If the state of the prior decree declines to assume jurisdiction to modify the decree, another state with jurisdiction under section 3 can proceed with the case. That is not so if the prior court dismissed the petition on its merits.

Respect for the continuing jurisdiction of another state under this section will serve the purposes of this Act only if the prior court will assume a corresponding obligation to make no changes in the existing custody arrangement which are not required for the good of the child. If the court overturns its own decree in order to discipline a mother or father, with whom the child had lived for years, for failure to comply with an order of the court, the objective of greater stability of custody decrees is not achieved. See Comment to section 13 last paragraph, and cases there cited. See also Sharpe v. Sharpe, 77 Ill. App. 295, 222 N.E. 2d 340 (1966). Under section 15 of this Act an order of a court contained in a custody decree can be directly enforced in another state.

Under subsection (b) transcipts of prior proceedings if received under section 22 are to be considered by the modifying court. The purpose is to give the judge the opportunity to be as fully informed as possible before making a custody decision. "One court will seldom have so much of the story that another's inquiry is unimportant" says Paulsen, Appointment of a Guardian in the Conflict of Laws, 45 Iowa L. Rev. 212, 226 (1960). See also Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extra-Litigious Proceedings, 64 Mich. L. Rev. 1, 6-7 (1965); and Ratner, Legislative Resolution of the Interstate Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act, 38 S. Cal. L. Rev. 183, 202 (1965). How much consideration is "due" this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act.

SECTION 15. [*Filing and Enforcement of Custody Decree of Another State.*]

(a) A certified copy of a custody decree of another state may be filed in the office of the clerk of any [District Court, Family Court] of this State. The clerk shall treat the decree in the same manner as a custody decree of the [District Court, Family Court] of this State. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this State.

(b) A person violating a custody decree of another state which makes it necessary to enforce the decree in this State may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

### COMMENT

Out-of-state custody decrees which are required to be recognized are enforced by other states. See section 13. Subsection (a) provides a simplified and speedy method of enforcement. It is derived from section 2 of the Uniform Enforcement of Foreign Judgments Act of 1964, 9A U.L.A. 486 (1965). A certified copy of the decree is filed in the appropriate court, and the decree thereupon becomes in effect a decree of the state of filing and is enforceable by any method of enforcement available under the law of that state.

The authority to enforce an out-of-state decree does not include the power to modify it. If modification is desired, the petition must be directed to the court which has jurisdiction to modify under section 14. This does not mean that the state of enforcement may not in an emergency stay enforcement if there is danger of serious mistreatment of the child. See Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795, 832-33 (1964).

The right to custody for periods of visitation and other provisions of a custody decree are enforceable in other states in the same manner as the primary right to custody. If visitation privileges provided in the decree have become impractical upon moving to another state, the remedy against automatic enforcement in another state is a petition in the proper court to modify visitation arrangements to fit the new conditions.

Subsection (b) makes it clear that the financial burden of enforcement of a custody decree may be shifted to the wrongdoer. Compare 2 Armstrong, California Family Law 328 (1966 Suppl.), and *Crocker v. Crocker*, 195 F. 2d 236 (1952).

Section 16. [*Registry of Out-of-State Custody Decrees and Proceedings.*] The clerk of each [District Court, Family Court] shall maintain a registry in which he shall enter the following:

(1) certified copies of custody decrees of other states received for filing;

(2) communications as to the pendency of custody proceedings in other states;

(3) communications concerning a finding of inconvenient forum by a court of another state; and

(4) other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this State or the disposition to be made by it in a custody proceeding.

### Comment

The purpose of this section is to gather all information concerning out-of-state custody cases which reaches a court in one designated place. The term "registry" is derived from section 35 of the Uniform Reciprocal Enforcement of Support Act of 1958, 9C U.L.A. 61 (1967 Suppl.) Another term may be used if desired without affecting the uniformity of the Act. The information in the registry is usually incomplete since it contains only those documents which have been specifically requested or which have otherwise found their way to the state. It is therefore necessary in most cases for the court to seek additional information elsewhere.

Section 17. [*Certified Copies of Custody Decree.*] The Clerk of the [District Court, Family Court] of this State, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

Section 18. [*Taking Testimony in Another State.*] In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.

### COMMENT

Sections 18 to 22 are derived from sections 3.01 and 3.02 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321, 326 (1966); from ideas underlying the Uniform Reciprocal Enforcement of Support Act; and from Ehrenzweig, the Interstate Child and Uniform Legislation: A Plea for Extralitigious Proceedings, 64 Mich. L. Rev. 1 (1965). They are designed to fill the partial vacuum which inevitably exists in cases involving an "interstate child" since part of the essential information about the child and his relationship to other persons is always in another state. Even though jurisdiction is assumed under sections 3 and 7 in the state where much (or most) of the pertinent facts are readily available, some important evidence will unavoidably be elsewhere.

Section 18 is derived from portions of section 3.01 of the Uniform Interstate and International Procedure Act, 9B U.L.A. 305, 321. The first sentence relates to depositions, written interrogatories and other discovery devices which may be used by parties or representatives of the child. The procedural rules of the state where the device is used are applicable under this sentence. The second sentence empowers the court itself to initiate the gathering of out-of-state evidence which is often not supplied by the parties in order to give the court a complete picture of the child's situation, especially as it relates to a custody claimant who lives in another state.

SECTION 19. [*Hearings and Studies in Another State; Orders to Appear.*]

(a) A court of this State may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this State; and to forward to the court of this State certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the [County, State].

(b) A court of this State may request the appropriate court of another state to order a party to custody proceedings pending in the court of this State to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.

### COMMENT

Section 19 relates to assistance sought by a court of the forum state from a court of another state. See comment to section 18. Subsection (a) covers any kind of evidentiary procedure available under the law of the assisting state which may aid the court in the requesting state, including custody investigations (social studies) if authorized by the law of the other state. Under what conditions reports of social studies and other evidence collected under this subsection are admissible in the requesting state, is a matter of internal state law not covered in this interstate statute. Subsection (b) serves to bring parties and the child before the requesting court, backed up by the assisting court's contempt powers. See section 11.

SECTION 20 [*Assistance to Courts of Other States.*]

(a) Upon request of the court of another state the courts of this State which are competent to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures availiable in this State [or may order social studies to be made for use in a custody proceeding in another state]. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced [and any social studies prepared] shall be forwarded by the clerk of the court to the requesting court.

(b) A person within this State may voluntarily give his testimony or statement in this State for use in a custody proceeding outside this state.

(c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. The court may condition compliance with the request upon assurance by the other state that state travel and other necessary expenses will be advanced or reimbursed.

### COMMENT

Section 20 is the counterpart of section 19. It empowers local courts to give help to out-of-state courts in custody cases. See comments to sections 18 and 19. The references to social studies have been placed in brackets so that states without authorization to make social studies outside of juvenile court proceedings may omit them if they wish. Subsection (b) reaffirms the existing freedom of persons within the United States to give evidence for use in proceedings elsewhere. It is derived from section 3.02 (b) of the Interstate and International Procedure Act, 9B U.L.A. 327 (1966).

SECTION 21. [*Preservation of Documents for Use in Other States.*] In any custody proceeding in this State the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches [18, 21] years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.

COMMENT

See comments to sections 18 and 19. Documents are to be preserved until the child is old enough that further custody disputes are unlikely. A lower figure than the ones suggested in the brackets may be inserted.

SECTION 22. [*Request for Court Records of Another State.*] If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this State, the court of this State upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in section 21.

COMMENT

This is the counterpart of section 21. See comments to sections 18, 19, and 14(b).

SECTION 23. [*International Application.*] The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees inolving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

COMMENT

Not all the provisions of the Act lend themselves to direct application in international custody disputes; but the basic policies of avoiding jurisdictional conflict and multiple litigation are as strong if not stronger when children are moved back and forth from one country to another by feuding relatives. Compare Application of Lang, 9 App. Div. 2d 401, 193 N.Y.S. 2d 763 (1959) and Swindle v. Bradley, 240 Ark. 903, 403 S.W. 2d 63 (1966).

The first sentence makes the general policies of the Act applicable to international cases. This means that the substance of section 1 and the principles underlying provisions like sections 6, 7, 8, and 14(a), are to be followed when some of the persons involved are in a foreign country or a foreign custody proceeding is pending.

The second sentence declares that custody decrees rendered in other nations by appropriate authorities (which may be judicial or administrative tribunals) are recognised and enforced in this country. The only prerequisite is that reasonable notice and opportunity to be heard was given to the persons affected. It is also to be understood that the foreign tribunal had jurisdiction under its own law rather than under section 3 of this Act. Compare Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, sections 10, 92, 98, and 109(2) (1967). Compare also Goodrich, Conflict of Laws 390-93 (4th ed., Scoles, 1964).

[Section 24. [*Priority.*] Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this Act the case shall be given calendar priority and handled expeditiously.]

### Comment

Judicial time spent in determining which court has or should exercise jurisdiction often prolongs the period of uncertainty and turmoil in a child's life more than is necessary. The need for speedy adjudication exists, of course, with respect to all aspects of child custody litigation. The priority requirement is limited to jurisdictional questions because an all encompassing priority would be beyond the scope of this Act. Since some states may have or wish to adopt a statutory provision or court rule of wider scope, this section is placed in brackets and may be omitted.

Section 25. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, its invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 26. [*Short Title.*] This Act may be cited as the Uniform Child Custody Jurisdiction Act.

Section 27. [*Repeal.*] The following acts and parts of acts are repealed:

(1)
(2)
(3)

Section 28. [*Time of Taking Effect.*] This Act shall take effect. . . . .